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No. 93-

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,
v.

MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS,
BRET MAXWELL, ROBERT NELSON and P. S. TUCKER,
Respondents.

**Petition for a Writ of Certiorari to the
Supreme Court of Illinois**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the express preemption clause of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305, preempt only those state law claims that relate to "essential" airline operations?
2. Does the scope of preemption under Section 1305 depend on the form of relief requested?

RULE 29.1 STATEMENT

Petitioner is wholly owned by AMR Corp., a Delaware corporation, and owns 49% of DFW Terminal Corp., a Texas corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner American Airlines, Inc. ("American") respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court in this case entered December 16, 1993.¹

OPINION BELOW

A prior opinion of the Illinois Supreme Court in this case is reported at 589 N.E.2d 533, and is reproduced in the Appendix to this Petition (App.) at 20a. That opinion was vacated by this Court in *American Airlines v. Wolens*, 113 S. Ct. 32 (1992), reproduced at App. 19a. The opinion and judgment of the Illinois Supreme Court on remand is presently unreported (1993 WL 518593 (Ill.)) and is reproduced at App. 1a.

¹ American is an interstate and international air carrier incorporated in Delaware with its principal place of business in Fort Worth, Texas. All parties to the proceeding before the Illinois Supreme Court are listed in the caption.

JURISDICTION

This petition has been filed within 90 days following entry of the judgment of the Illinois Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the express preemption clause of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1), which provides in relevant part as follows:

Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

STATEMENT OF THE CASE

On remand from this Court after *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), the Illinois Supreme Court held that Section 1305 of the Airline Deregulation Act does not preempt state law challenges to the terms and conditions of airline frequent flyer programs because such programs are not "essential elements" of airline operations, and because the relief requested, compensatory and punitive damages, would not directly "establish" the rates, "determine" the routes, or "dictate" the services offered through those programs.

Review of this decision is urgently needed. In direct conflict with *Morales* and with several federal courts of appeals, the Illinois Supreme Court has approved nationwide class actions raising state law challenges to airline rates and services that Congress plainly intended

to preempt under Section 1305, and has thereby jeopardized the objectives of the Airline Deregulation Act.

A. Background.

Congress passed the Airline Deregulation Act in 1978. As this Court recognized in *Morales*, the Act places "maximum reliance on competitive market forces" to further "efficiency, innovation and low prices" as well as the "variety [and] quality . . . of air transportation services." 112 S. Ct. at 2034. To "ensure that the States would not undo federal deregulation" by imposing burdensome and potentially conflicting state requirements, *id.*, the Act expressly preempts all state laws "relating to [the] rates, routes, or services" airlines offer. 49 U.S.C. App. § 1305.

Frequent flyer programs were an important product of deregulation. In 1981 American introduced the first such program, the "AAdvantage" program, as a service for American's customers and an innovative way of competing with other airlines. American's competitors quickly followed suit, and today every major airline has its own frequent flyer program.

AAdvantage members accrue mileage credits when they fly on American. They can then use their mileage, subject to the terms and conditions of the program, to buy tickets to fly on domestic or international routes, or to upgrade to a higher level of service.² AAdvantage members thus purchase airline services by redeeming accrued mileage at rates set by American for such services. Whether tickets are purchased with cash or with AAdvantage awards, the essence of the transaction is that American is setting the rates for the primary service it offers—air travel.

² Mileage credits can be earned in a variety of other ways and can also be exchanged for services that do not involve air travel. Those non-flight services were not challenged in this litigation.

AAdvantage program membership has dramatically expanded since 1981 and now includes millions of participants from all 50 States and many foreign countries. As the United States Department of Transportation has found, air "carriers use their [frequent flyer] programs as a means of competing for passengers. Since the programs began, each carrier has greatly expanded the kinds of awards that members can obtain and the ways in which members can accumulate award miles in order to make its program more attractive."³ Over the years, American has expanded its route system to serve popular but previously unavailable destinations such as the Caribbean, Europe and the Far East. AAdvantage members can use mileage credits accumulated before American's routes were expanded to purchase flights to those new destinations.⁴

Like all other airlines, American from time to time must modify the balance of benefits and restrictions in its AAdvantage program. The Department of Transportation has concluded that such changes are "legitimate methods for controlling the cost of frequent flyer plans." Indeed, as DOT has observed, without such cost controls frequent flyer programs would be too expensive for the airlines to maintain. *See* DOT Order, App. 100a.

B. The Proceedings Below.

Respondents are residents of Illinois, California and Connecticut. They filed parallel suits, later consolidated,

³ Dep't of Transportation Order No. 92-5-60 (May 29, 1992) ("DOT Order"), App. 99a.

⁴ Frequent flyer programs also directly involve foreign commerce because American and other airlines now allow mileage to be redeemed for flights to foreign destinations, and because partnerships with airlines of different countries have been negotiated to permit redemption of mileage for travel on those foreign airlines. Many foreign governments claim the right to regulate such programs for the protection of their own national airlines. Accordingly, the Department of State, in its conduct of bilateral aviation negotiations with other countries, has had to defend the ability of U.S. airlines to use frequent flyer programs as a marketing tool.

in Illinois state court, purporting to represent a nationwide class "consisting of approximately four million" AAdvantage members.⁵ Respondents challenged American's May 1988 modifications to the AAdvantage program.⁶ In particular, respondents challenged American's policies regarding the number of seats on particular flights set aside for AAdvantage members (capacity controls) and American's alleged restrictions on the dates certain kinds of AAdvantage awards could be used (blackout dates).⁷

Respondents conceded that American had explicitly "reserved the right to restrict, suspend, or otherwise alter aspects of the Program,"⁸ but alleged that this express reservation did not provide adequate notice that American retained the right to alter program terms for previously accumulated mileage.⁹ Respondents thus directly challenged American's right to determine the number of AAdvantage seats available on any given flight. They claimed an Illinois state law right to use their AAdvantage mileage to purchase "any available seat" on "any available date" (*i.e.*, airline "services"), at particular AAdvantage fares (*i.e.*, "rates").¹⁰

Respondents alleged that American's conduct violated both the Illinois Consumer Fraud and Deceptive Business Practices Act ("the Consumer Fraud Act"), Ill. Rev. Stat. ch. 121½, sec. 261 *et seq.*, and Illinois contract law. They sought two forms of relief: (i) compensatory

⁵ Tucker Complaint, Count I, ¶ 5; App. 63a.

⁶ Wolens Complaint, Count I, ¶ 14; App. 52a.

⁷ Respondents did not complain of the many additions to the AAdvantage program that increased the "value" of their previously accumulated mileage.

⁸ Tucker Complaint, Count I, ¶ 12; App. 64a.

⁹ *See* Wolens Complaint, Count III, ¶ 15; App. 56a.

¹⁰ *See* Wolens Complaint, Count I, ¶ 13; App. 52a.

and punitive damages;¹¹ and (ii) an injunction requiring American to redeem mileage credits accumulated before May 1988 for the same fares and unrestricted seating respondents claim they could have obtained before that date, and preventing “retroactive application” of any future changes in the program.¹² The damages and injunctive claims were premised on identical facts and causes of action.

American moved to dismiss these claims under Section 1305 of the Airline Deregulation Act, on the ground that the claims related to American’s “rates, routes, or services,” and were therefore preempted. The trial court denied American’s motion but certified that ruling for interlocutory appeal. App. 41a.

C. The Illinois Supreme Court’s Initial Decision.

After an intervening appellate court decision (App. 31a), the Illinois Supreme Court held that Section 1305 preempted respondents’ claims for injunctive relief. The court reasoned that “injunctive relief would involve the regulation of defendant’s services and therefore violate section 1305.” App. 23a. The court then ruled that Section 1305 did *not* preempt respondents’ identical “claims for damages for breach of contract and violation of the Consumer Fraud Act.” App. 23a. The court relied on what it incorrectly characterized as “the prevailing view, set forth in *West v. Northwest Airlines, Inc.*, (9th Cir. 1990), 923 F.2d 657; that ‘section 1305(a)(1) pre-empts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services.’” App. 23a. The court frankly stated that it had “narrowly construed” Section 1305 “to preempt only those State laws and regulations that spe-

¹¹ Wolens Complaint, Counts I-IV, ¶ B, App. 53a, 55a, 58a, 59a; Tucker Complaint, Counts I-IV, ¶ B, App. 67a, 68a, 71a, 72a.

¹² Tucker Complaint, App. 67a.

cifically relate to . . . an airline’s rates, routes, or services.” App. 24a (emphasis added).

Chief Justice Miller concurred in the judgment. He disagreed with the majority’s view that preemption depends on “whether the State law at issue is general or specific.” App. 25a. He contended that Section 1305 did not apply for a different reason: respondents’ damages claims were “not regulatory in force or effect” because they “do not establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide.” App. 28a.

D. This Court’s Prior Decision.

After the Illinois Supreme Court’s initial judgment, this Court decided *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). *Morales* held that state law “relates to” airline “rates, routes, or services,” and is therefore preempted by Section 1305, if it has a “connection with or reference to” rates, routes, or services—“even if the law is not specifically designed” to regulate airlines. 112 S. Ct. at 2033, 2038. *Morales* found it “utterly irrational” that “state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general” law. *Id.* at 2035. Applying this sweeping interpretation of Section 1305, the Court held that deceptive advertising claims against airlines (based on guidelines promulgated by the National Association of Attorneys General (“NAAG”)) were preempted.

American petitioned for certiorari, arguing that the Illinois Supreme Court’s decision relied on precisely the distinction *Morales* rejected—between general laws and laws that “specifically” relate to airline rates, routes, or services.¹³

¹³ Shortly after issuing its ruling in *Morales*, this Court vacated the Ninth Circuit’s ruling in *West v. Northwest Airlines* (the

Respondents did not cross-petition for review of the Illinois Supreme Court's decision to preempt their injunctive claims. To the contrary, they conceded that this aspect of the decision was "carefully reasoned" and "fully consistent" with *Morales* because injunctive relief "would require the court to regulate the manner in which American provided its passengers transportation services."¹⁴ Respondents nonetheless argued that *Morales* did not require reconsideration of the Illinois Supreme Court's refusal to preempt their damages claims because damages, unlike an injunction, would not have a direct regulatory effect on American's conduct.¹⁵

This Court granted American's petition for certiorari, vacated the Illinois Supreme Court's judgment, and remanded for reconsideration in light of *Morales*. *American Airlines, Inc. v. Wolens*, 113 S. Ct. 32 (1992); App. 19a.

E. The Illinois Supreme Court's Decision on Remand.

On December 16, 1993, the Illinois Supreme Court reaffirmed its prior holding in all respects. Writing for the majority, Justice Bilandic expressly reaffirmed the court's prior ruling preempting respondents' injunctive claims. App. 2a. The court then held that its "previous holding that plaintiffs' claim for money damages was not preempted because it bears only a tangential relation to airline rates, routes, and services, comports with the *Morales* decision." App. 6a.

The court gave two new reasons for reaffirming its refusal to preempt respondents' damage claims. *First*, the court concluded that "[a] frequent flyer program is not

ruling on which the Illinois Supreme Court's initial opinion was based), and remanded for reconsideration in light of *Morales*. See *Northwest Airlines, Inc. v. West*, 112 S. Ct. 2932 (1992).

¹⁴ Brief in Opposition in No. 92-249, at 9.

¹⁵ *Id.* at 9-11.

an essential element to the operation of an airline" because "the airline industry functioned successfully for decades" without frequent flyer programs. App. 6a. Therefore, in the court's view, state law suits challenging a frequent flyer program would have only a "peripheral" or "tangential" effect on airline operations. App. 6a. *Second*, expressly adopting the test for preemption urged in Chief Justice Miller's prior concurrence, the court concluded that because respondents were seeking "*only* money damages," App. 6a (emphasis added), their claims did not "'seek to establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide.'" App. 6a (quoting prior opinion).¹⁶

Justice McMorrow dissented. She noted that "reduced to their simplest terms, plaintiffs' claims . . . are based upon allegations of American's deceptive advertising, promotions, and inducements relating to airline fares (i.e., payment of travel fares with mileage credits and upgrades in seating classes) and services (i.e., the quantity of seats and flights and the dates of travel to various destinations)." App. 12a. She also noted that "[p]laintiffs' allegations virtually mirror the restrictions . . . in the NAAG Guidelines on frequent flyer programs." App. 12a. Justice McMorrow stressed that *Morales* "rejected a contention essentially the same as that made by Justice Miller in his special concurrence to this court's previous opinion *and now adopted by the majority*, that plaintiffs' claims are not preempted because they do not seek to 'establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines

¹⁶ Although the Illinois Supreme Court did not explain the relation between these two grounds of decision, both were necessary to its result. If the court's application of Section 1305 depended entirely on whether the airline conduct at issue was "essential," the court would necessarily have declined to preempt the injunctive claim.

must provide.' " App. 9a (quoting majority opinion; emphasis added). In Justice McMorrow's view, Section 1305 applied equally "whether plaintiffs seek [an injunction] to enforce the terms and conditions of the program or an award of money damages for American's alleged breach of those contractual obligations." App. 13a.

Unlike the majority, Justice McMorrow recognized that *Morales* gave an "expansive and sweeping interpretation of the phrase 'relating to'" in Section 1305. Justice McMorrow recognized that the claims at issue in this case directly paralleled those at issue in *Morales*. As in *Morales*, respondents here invoked state law to create binding obligations and enforceable duties based on allegedly insufficient notice, and sought to require American to "continue to redeem mileage credits earned prior to May 1988 for the same free fares and unrestricted seating and flight services which the AAdvantage program provided up until that time," or pay "money damages for . . . breach of those contractual obligations." App. 13a. Contrasting the majority's interpretation of Section 1305 with the Seventh Circuit's interpretation in *Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir.), cert. denied, 114 S. Ct. 603 (1993), Justice McMorrow concluded that "under the rationale of *Morales* and its progeny, plaintiffs' [compensatory and punitive damages] claims have a connection with and relation to American's rates and services, and are preempted by section 1305 (a)(1) of the Deregulation Act." App. 14a, 16a.¹⁷

¹⁷ The Illinois Supreme Court stayed its mandate pending disposition of the instant petition for certiorari. App. 17a.

REASONS FOR GRANTING THE PETITION

The Illinois Supreme Court's decision on remand from this Court conflicts directly with *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). The decision threatens the economic stability of the airline industry and undermines the core federal policies of the Airline Deregulation Act.

Despite *Morales'* clear directive that Section 1305 should be given an "expansive sweep," *id.* at 2037, the Illinois Supreme Court has continued to apply Section 1305 extremely narrowly. As a result, Illinois state courts are the forum of choice for nationwide class actions challenging frequent flyer programs and a host of other airline practices that Congress plainly intended to exempt from regulation by the fifty States. In addition to the present case, a nationwide class action suit challenging United Airlines' frequent flyer program was filed in Illinois state court in December 1993.¹⁸ A similar action challenging Delta Airlines' frequent flyer program, previously dismissed without prejudice pending the Illinois Supreme Court's ruling in this case, will certainly be reinstated.¹⁹ Three additional class actions challenging other aspects of airline rates and services are also pending in Illinois state court.²⁰ These class actions collectively

¹⁸ *Silver v. United Airlines, Inc.*, No. 93 CH-11098 (Circuit Court of Cook County) (filed December 10, 1993) (Copies of the complaint have been lodged with the Clerk of this Court). Like the complaint in this case, *Silver* invokes the Illinois Consumer Fraud Act and Illinois common law of contract to assert claims on behalf of millions of members of United's Mileage Plus program.

¹⁹ *Ryan v. Delta Airlines, Inc.*, No. 88 CH-4846 (Circuit Court of Cook County). In an order dated October 21, 1992, the court dismissed the case without prejudice, "pending the decision of the Illinois Supreme Court in *Wolens v. American Airlines*," and granted plaintiffs the "right to reinstate without costs after said ruling."

²⁰ See *Johnson v. American Airlines, Inc.*, No. 93-1156 (Appellate Court of Illinois) (cancellation policies); *Baskin v. United Airlines*,

threaten the nation's major airlines with massive liabilities, and will force all national airlines to conform their nationwide practices to the particular strictures of Illinois law—a result antithetical to the central objective of the Airline Deregulation Act. This prospect justifies immediate review whether or not other courts would adopt the interpretation of Section 1305 that now prevails in Illinois.

Review is all the more necessary because the Illinois Supreme Court's decision is illustrative of widespread conflict and confusion in the lower courts. In particular, the Illinois Supreme Court's decision conflicts with the decisions of federal courts of appeals, including the Seventh Circuit, on two important and recurring questions that have divided the lower courts even after *Morales*: (1) whether a state claim that "relates to rates, routes, or services" within the meaning of Section 1305 is preempted only if the conduct at issue meets the additional requirement of being "essential" to an airline's operation; and (2) whether preemption under Section 1305 depends on the form of relief requested.

I. THE ILLINOIS SUPREME COURT DISREGARDED *MORALES v. TRANS WORLD AIRLINES, INC.* ON A MATTER OF CRITICAL IMPORTANCE TO THE AIRLINE INDUSTRY.

The decision of the Illinois Supreme Court conflicts directly with *Morales*, which broadly established that Section 1305 preempts all state claims "having a connection with or reference to airline 'rates, routes, or services.'" 112 S. Ct. at 2037 (emphasis added).²¹

Inc., No. 93-1214 (Appellate Court of Illinois) (cancellation policies); *Quality G&B of Illinois v. Airborne Freight Corp.*, No. 93-3895 (Appellate Court of Illinois) (air freight services).

²¹ As the Court held, Section 1305, like the similarly-worded ERISA preemption provision, has "an expansive sweep" and is "conspicuous for its breadth." 112 S. Ct. at 2037 (quotations

The Illinois Supreme Court acknowledged that respondents' claims have a connection with American's rates, routes, or services, and so held when it preempted their injunctive claims. App. 2a. The court nevertheless refused to preempt respondents' compensatory and punitive damages claims, even though those claims were based on the same facts and causes of action. Seeking to justify these contradictory dispositions, the Illinois Supreme Court seized on *Morales'* dictum that some state laws (like gambling and prostitution laws) may "affect" rates, routes, or services "in too tenuous, remote or peripheral a manner" to warrant preemption. App. 6a-7a (quoting *Morales*, 112 S. Ct. at 2040). According to the Illinois Supreme Court, respondents' damages claims were "tenuous, remote or peripheral" within the meaning of *Morales* because frequent flyer programs—though related to airline rates and services—are not "essential" to airline operations, and because a damages remedy would not "establish" the rates, "determine" the routes, or "dictate" the services airlines offer.

That ruling flies in the face of *Morales*. The *Morales* test preempts respondents' damages claims because those claims bear an obvious "connection with or reference to" airline rates and services. Respondents directly seek a judicial determination that they have a right under Illinois state law to purchase the core "service" provided by American—air travel—at particular AAdvantage "rates," and that they may recover compensatory and punitive damages for an alleged violation of that "right." The connection with American's rates and services could hardly be closer. As in *Morales*, respondents claim they

omitted). Thus, Section 1305 "ensure[s] that the States would not undo federal deregulation" through the application of their own potentially conflicting laws, and leaves protection of consumers as the responsibility of the United States Department of Transportation under uniform federal standards. *Id.* at 2034, 2040. DOT's statutory authority is codified at 49 U.S.C. § 1381.

were injured by allegedly inadequate notice regarding limits on the availability of rates and services, and seek to transform that "fail[ure] to include the mandated explanations and disclaimers" into an "enforceable right" to particular services at particular rates. See *Morales*, 112 S. Ct. at 2039-40 (emphasis added).

Morales refutes the two reasons offered by the Illinois Supreme Court for refusing to preempt respondents' damages claims. First, the Illinois Supreme Court's "essential element" test is antithetical to the expansive "connection with or reference to" test established in *Morales*. This Court repeatedly emphasized that Section 1305 is "conspicuous for its breadth," and must be given an "expansive sweep." 112 S. Ct. at 2037. Under the Illinois Supreme Court's "essential element" test, airline practices postdating deregulation—including not only frequent flyer programs but also competitive innovations such as American's Ultimate Supersaver deep discount fares—are not "essential" and therefore can be regulated. Prior to deregulation, however, the Civil Aeronautics Board strictly regulated *all* aspects of airline competition, including the prices airlines charged and the routes they served. Congress chose deregulation in 1978 because it believed that vigorous competition would produce better results for consumers. By using a historical test to determine what airline operations are "essential," the Illinois Supreme Court has contravened congressional intent, and reversed the benefits of deregulation, by permitting States to step in and regulate the very innovations deregulation was intended to encourage. Furthermore, the Illinois Supreme Court's test requires state courts to make technical, expert judgments as to whether the conduct at issue concerns a part of the airline's business that is "essential" to its operations. These are precisely the types of determinations which the Airline Deregulation Act, and Section 1305 in particular, were designed to preclude.

Second, *Morales* forecloses any distinction under Section 1305 between claims seeking damages and claims seeking injunctive relief. As Justice McMorrow stressed in dissent below, *Morales* squarely *rejected* the contention that Section 1305 "only preempts the States from actually prescribing rates, routes or services," and held that such an interpretation "simply reads the words 'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to 'regulate rates, routes, and services.'" App. 16a. (quoting *Morales*, 112 S. Ct. at 2037-38 (emphasis in original)). Adopting the Court's earlier ERISA precedents, *Morales* followed *Pilot Life*, which "held that a common-law tort and contract action *seeking damages* . . . was pre-empted by ERISA." *Morales*, 112 S. Ct. at 2039 (emphasis added).²² Thus, *Morales* clearly held that Section 1305 preempts actions seeking damages even if damages would not actually "establish" rates, "determine" routes or "dictate" services.²³

²² The Court has consistently declined to distinguish between damage awards and injunctive relief under the identically-worded ERISA preemption provision. *E.g. Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138-39 (1990). In *Morales* the Court made clear those ERISA precedents are fully applicable to Section 1305. 112 S. Ct. at 2039.

²³ In this respect, the Illinois Supreme Court's decision also conflicts with *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), which confirmed that the form of relief is generally irrelevant to preemption analysis. Justice Stevens' opinion (for four Justices) specifically refused to distinguish between damages and injunctive claims, because "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." 112 S. Ct. at 2620 (quotation omitted); accord *id.* at 2632, 2634 (Scalia and Thomas, JJ., concurring). See also *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959); *International Paper Co. v. Ouellette*, 479 U.S. 481, 498 n.19 (1987) ("We decline . . . to draw a line between the types of relief sought. . . . [U]nless there is evidence that Congress meant to 'split' a particular remedy for pre-emption purposes, it is assumed that the full cause of action under state law is . . . pre-empted.").

The Illinois Supreme Court's ruling is such a clear departure from *Morales* that summary reversal is appropriate. If the decision is not summarily overturned, then plenary review is urgently needed because of the decision's nationwide impact on the airline industry. Under the Illinois Supreme Court's decision, respondents can seek compensatory and punitive damages against American on behalf of millions of class members residing throughout the country. In addition, because all airlines adjust their operations—including frequent flyer programs—as competitive conditions in the volatile airline industry change, all national airlines now face a risk of similar suits in Illinois challenging their frequent flyer programs, and other aspects of their rates and services. Separate class actions have been filed in Illinois state courts challenging the frequent flyer programs of United Airlines and Delta Airlines, as have three additional class actions challenging other aspects of airline rates and services. See page 11 *supra*. The pace of such filings will surely quicken if certiorari is denied in this case.

As a practical matter, the Illinois Supreme Court's decision requires all major airlines to conform their nationwide conduct to Illinois' restrictive standards, irrespective of the negative effect on competition and consumer welfare. It is irrelevant that other courts might interpret Section 1305 properly, and preempt damage claims involving frequent flyer programs, because litigants will simply bring their claims in Illinois state courts.²⁴ The Illinois Supreme Court has thus established a *de facto* national rule barring the application of Section 1305 to damage claims involving the rates, routes, or services

²⁴ To the extent other States are emboldened to follow the erroneous path taken by Illinois and assert sovereignty over airline frequent flyer programs or other aspects of airline operations, airlines will face the need to run their programs in compliance with the "lowest common denominator" established by any of the 50 States—the very result Congress sought to prevent by enacting Section 1305.

offered through frequent flyer programs, and has forced airlines to tailor their frequent flyer programs to Illinois' regulatory requirements.²⁵ Congress surely did not intend this result.

Furthermore, review should be granted in this case because it directly involves the 1987 NAAG Guidelines, the advertising portions of which were held to be preempted in *Morales*. As Justice McMorroff stressed in dissent, respondents' allegations "virtually mirror the restrictions regarding the advertising of frequent flyer benefits and the institution of capacity controls and other frequent flyer program modifications without advance notice . . . in the NAAG Guidelines." App. 12a.²⁶ Thus, the Illinois Supreme Court has effectively held that Section 1305 does not preempt the frequent flyer provisions of the Guidelines, even though *Morales* holds that Section 1305 *does* preempt the advertising provisions of those same Guidelines. The Illinois Supreme Court's ruling is

²⁵ This aspect of the Illinois Supreme Court's ruling also violates the Commerce Clause, both because Illinois is establishing a *de facto* national standard, see *Huron Portland Cement Co. v. Detroit, Michigan*, 362 U.S. 440, 444 (1960); *Southern Pac. Co. v. State of Arizona*, 325 U.S. 761, 767 (1945), and because Illinois is projecting its "regulatory regime into the jurisdiction of another state." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 337 (1989). American raised these Commerce Clause arguments in the Illinois Supreme Court. The court never addressed those arguments as they apply to respondents' damage claims. The presence of these Commerce Clause issues is an additional reason for granting certiorari.

²⁶ Illinois is a signatory to the Guidelines. The Illinois Consumer Fraud Act will therefore be enforced with respect to frequent flyer programs in accordance with those Guidelines. See *Morales*, 112 S. Ct. at 2041 (Appendix) (noting that the Illinois Attorney General served on a NAAG task force to evaluate the effectiveness of the Guidelines). Indeed, the Attorney General of Illinois was a party to *Morales*. See *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 n.1 (5th Cir. 1989) (identifying Illinois as an appellee).

a matter of national importance because 34 States are signatories to the Guidelines. For this reason, the question presented in this petition is at least as important as the question presented in *Morales*.²⁷

II. THE DECISION OF THE ILLINOIS SUPREME COURT CONFLICTS WITH DECISIONS OF FEDERAL COURTS OF APPEALS, INCLUDING THE SEVENTH CIRCUIT.

Plenary review is also warranted because the Illinois Supreme Court's decision conflicts with decisions of federal courts of appeals, and reflects persistent and widespread confusion over the scope of Section 1305 preemption, in two distinct ways. *First*, the Illinois Supreme Court's ruling that Section 1305 preempts only state laws that affect "essential elements" of airline operations conflicts with other courts regarding what falls within the definition of "relating to rates, routes, or services" in Section 1305. *Second*, the Illinois Supreme Court's ruling conflicts with other courts regarding whether Section 1305 preemption depends on the form of *relief* requested.

Unfortunately, as the present case starkly illustrates, *Morales* has not put to rest the recurring disagreements in the lower courts about the preemptive scope of Sec-

²⁷ The striking similarities between the NAAG fare advertising provisions held preempted in *Morales* and the NAAG frequent flyer provisions at issue here demonstrate that this action "relates to" airline rates and services. Both provisions prescribe the specific disclosures airlines must make regarding any restrictions or reservations that might apply. Just as the fare advertising provisions require "clear and conspicuous" disclosure of restrictions such as "limited time availability . . . day-of-week restrictions . . . [and] limits on fare availability," *Morales*, 112 S. Ct. at 2038-39, the frequent flyer provisions require "clear and conspicuous" disclosure of "any reservation of any right to make future changes in the program award level," *Morales*, 112 S. Ct. at 2039, including in particular any changes involving "blackout dates" or "capacity controls." *Id.* at 2049. This lawsuit is based on the claim that American's reservation of rights was not sufficiently "clear" under Illinois law.

tion 1305. Some courts have correctly followed *Morales* and given Section 1305 the broad scope Congress intended. *E.g.*, *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993), *petition for rehearing en banc granted*, 1994 WL 6232 (Jan. 12, 1994); *Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir.), *cert. denied*, 114 S. Ct. 603 (1993); *Vail v. Pan Am Corp.*, 616 A.2d 523 (N.J. 1992). Indeed, at least one federal district court in the Ninth Circuit has held that Section 1305 preempts state consumer fraud and breach of contract claims seeking damages for alleged failure to provide adequate notice of changes in the terms of a frequent flyer program. *Shaefer v. Delta Air Lines, Inc.*, No. 92-1170-E (LSP) (S.D. Cal. Sept. 18, 1992).²⁸ Other courts, including the Illinois Supreme Court, have converted *Morales*' suggestion that some state laws (such as prostitution or gambling laws) may affect rates, routes, or services in "too tenuous, remote or peripheral a manner" into a loophole allowing them to continue to construe Section 1305 narrowly. *E.g.* *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993), *petition and cross petition for certiorari pending* (Nos. 93-803, 93-901).

As with the similarly worded ERISA preemption provision, Section 1305's application to "a wide variety of state statutory and decisional law" is generating a continuing need for guidance from this Court. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). The pat-

²⁸ Justice McMorrow's dissent noted the conflict between *Shaefer* and the majority opinion. *See* App. 14a. The decision below also conflicts with several other federal district court decisions involving other airlines services. *E.g.*, *Continental Airlines, Inc. v. American Airlines, Inc.*, 824 F. Supp. 689 (S.D. Tex. 1993) (Section 1305 preempts common law damage claims for tortious interference and unfair competition based on airline prices); *Lawal v. British Airways, PLC*, 812 F. Supp. 713 (S.D. Tex. 1992) (Section 1305 preempts damage claim for failure to honor discount ticket); *Cannava v. U.S. Air*, 1993 U.S. Dist. LEXIS 16726 (D. Mass. Jan. 7, 1993) (Section 1305 preempts damage claim for mistreatment during boarding).

tern of confused and conflicting decisions after *Morales* replicates the pattern under ERISA.²⁹ Thus, as in the ERISA context, "it is hardly surprising" that *Morales* did not settle all questions regarding the application of Section 1305, and that additional guidance is needed from this Court. See *Pilot Life*, 481 U.S. at 47. Indeed, this Court's opinion in *Morales* expressly recognized that further development of the law would be necessary to determine the outer boundaries of Section 1305. See *Morales*, 112 S. Ct. at 2037-39.

A. Scope of "relating to rates, routes, or services."

The Illinois Supreme Court concluded that claims which plainly relate to an airline's rates and services are *not* preempted because a "frequent flyer program is not an essential element to the operation of an airline," and because "frequent flyer programs are peripheral."³⁰ This ruling conflicts with other circuits in an outcome determinative way, and illustrates continuing confusion over a question on which courts of appeals have affirmatively requested further guidance from this Court.

1. *Conflict With the Seventh Circuit.* The Illinois Supreme Court's "essential element" test conflicts with

²⁹ See *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (addressing meaning of "relating to" in ERISA preemption provision); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (same); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (same); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (same); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (same); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (same); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) (same); *Massachusetts v. Morash*, 490 U.S. 107 (1989) (same); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (same); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (same); *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992) (same).

³⁰ This conclusion, based on no evidence in the record, ignores the contrary conclusion of the United States Department of Transportation. See pages 26-29 *infra*.

the test adopted by the Seventh Circuit in *Statland v. American Airlines, Inc.*, 998 F.2d 539, *cert. denied*, 114 S. Ct. 603 (1993).

For purposes of Section 1305 preemption, the claims at issue in *Statland* directly parallel the claims at issue here. In *Statland*, as in this case, the plaintiff sought compensatory and punitive damages. In *Statland*, as in this case, the plaintiff claimed that insufficient notice triggered liability under the Illinois Consumer Fraud Act and the common law of contract. In particular, the plaintiff claimed that American's express reservation of the right to retain a 10% cancellation penalty was insufficiently clear as to whether 10% of the tax was included in the penalty, and that it would therefore violate Illinois law to permit American to retain 10% of the tax. Thus, in both *Statland* and in this case, the issue was whether damage claims under the Illinois Consumer Fraud Act and common law of contract, based on allegedly inadequate notice of the rights reserved by American, were preempted by Section 1305.

Applying *Morales*, the Seventh Circuit held it was "obvious" these state law claims were related to airline rates, routes or services. *Statland*, 998 F.2d at 542. The conduct challenged in *Statland*—withholding 10% of the tax portion of a ticket price as part of a cancellation penalty—is not "essential" to an airline's operation, yet the Seventh Circuit had no difficulty concluding that the claims were preempted.

The Illinois Supreme Court's decision also conflicts with the Seventh Circuit's earlier decision in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990)—a case cited with approval in *Morales*. 112 S. Ct. at 2039. *Illinois Corporate Travel* involved a provision in American's contracts with travel agents which prohibited those agents from advertising that they offered rebates of the commissions earned on the sale of American's tickets.

899 F.2d at 752. That provision is not an "essential element" of airline operations, but the Seventh Circuit nevertheless ruled that challenges to that provision were preempted.³¹

The conflict between the Seventh Circuit and the Illinois Supreme Court is particularly troubling because identical statutory and common law claims would not be preempted in state court under the Illinois Supreme Court's test but would be preempted under the Seventh Circuit's test. A conflict of this nature is intolerable. It leaves the preemptive effect of federal law on actions brought in Illinois dependent solely on the forum in which the action is brought, thus encouraging forum shopping. Review is especially warranted because the very issue on which the Illinois Supreme Court and the Seventh Circuit have divided—the scope of preemption under Section 1305—itself involves the proper relationship between federal and state regulatory authority. The state court is construing the congressional command narrowly to preserve state regulatory power, while the federal courts are construing it broadly to effectuate the deregulatory goals of Congress. As a practical matter, the availability of nationwide class actions means that the Illinois Supreme Court's decision will thwart federal policy on a national basis, and not merely within Illinois.

2. *Other Conflicts.* The Illinois Supreme Court's interpretation of Section 1305 also conflicts with *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S. Ct.

³¹ In *Illinois Corporate Travel*, the Seventh Circuit (per Easterbrook, J.) held that damage claims asserted under the Illinois Consumer Fraud Act and under a common law contract theory were preempted by Section 1305. 889 F.2d at 754. The Court's decision in *Morales*, and in particular its citation with approval of Judge Easterbrook's analysis in *Illinois Corporate Travel*, makes clear that the Seventh Circuit's approach implements congressional intent.

2956 (1992). In *Federal Express*, the Ninth Circuit held that Section 1305 preempts state regulation of ground transportation aspects of an airline's express delivery service. Had it applied the Illinois Supreme Court's "essential element" test, the Ninth Circuit could not have reached the result it did, because the ground transportation services of an air express delivery service are not essential elements of airline operations.³²

The Illinois Supreme Court's decision also conflicts with *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, in which the Fifth Circuit noted that Section 1305 was intended to "secure by federal preemption the benefits of economic deregulation of the airline industry," and thus should preempt all state claims relating to "the contractual arrangement between the airline and the user of the service." *Id.* at 354.³³ See also *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989); *Anderson v. US Air, Inc.*, 818 F.2d 49 (D.C. Cir. 1987).

Further guidance from this Court is plainly needed. In *West*, the Ninth Circuit noted that *Morales* "does not provide much guidance to courts which must decide which state laws" are preempted and which are not. 995 F.2d at 151. The *Hodges* court expressly acknowledged that the claims at issue in *West* "would be pre-empted under [its] interpretation" of Section 1305. 4 F.3d at 356. The frequent flyer claims at issue in this case (as well as the claim at issue in *West*) would certainly be preempted

³² This Court's decision to deny certiorari in *Federal Express*, which had been held pending *Morales*, casts further doubt on the Illinois Supreme Court's conclusion that its "essential element" test is consistent with *Morales*.

³³ At the invitation of the *Hodges* panel, the Fifth Circuit has recently granted rehearing en banc in *Hodges* to consider whether Section 1305 preemption should extend beyond "contractual arrangements" to preempt state law personal injury claims for accidents occurring in the course of air travel. 4 F.3d at 356.

under the Fifth Circuit's *Hodges* test, as well as the Seventh Circuit's analysis in *Statland* and *Illinois Corporate Travel*.³⁴ Thus, the Illinois Supreme Court and the Ninth Circuit have adopted an interpretation of Section 1305 that conflicts directly with the governing interpretation in the Seventh Circuit, and the Fifth Circuit's interpretation in *Hodges*.

B. Form of Relief.

The Illinois Supreme Court held that Section 1305 preempted respondents' injunctive claims, but not respondents' compensatory and punitive damage claims, because the damage claims would not "establish" rates, "determine" routes or "dictate" services. This aspect of the court's decision conflicts directly with this Court's rulings under other statutory schemes in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959), and *International Paper Co. v. Oullette*, 479 U.S. 481, 498 n.19 (1987), all of which rejected any distinction between injunctive and damages relief for preemption purposes. The Illinois Supreme Court's decision also conflicts with the rulings of two federal courts of appeals. Thus, despite this Court's rulings under other statutory schemes, the lower courts remain divided over this question with respect to Section 1305.

1. *Conflict with the Seventh Circuit in Statland.* The Illinois Supreme Court's ruling conflicts with *Statland* on the form of relief issue. The plaintiff in *Statland* sought compensatory and punitive damages—but not injunctive relief—under the Illinois Consumer Fraud Act and state common law of contract, arising from Ameri-

³⁴ The respondents in *West* acknowledged as much in their Brief in Response to the Petition for Certiorari, No. 93-803, at 8 ("*Statland's* broad reading of Section [1305] suggests that the Seventh Circuit would find claims such as Mr. West's preempted."); see also *id.* ("wherever the Fifth Circuit may draw the line between preempted and nonpreempted claims, Mr. West's claims would be preempted in that Circuit").

can's alleged failure to provide adequate notice that its 10% penalty for cancelled tickets would include 10% of the tax as well as 10% of the ticket's base price. Because the notice was inadequate, the plaintiff contended, American was under both a binding contractual obligation and an enforceable statutory duty to refund the portion of the cancellation penalty representing 10% of the tax. The Seventh Circuit held that those damages claims were preempted, even though they would not "establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide."

2. *Conflict With West.* The Illinois Supreme Court's ruling that Section 1305 does not preempt punitive damage awards also conflicts with the Ninth Circuit's ruling on remand in *West v. Northwest Airlines, Inc.* In *West*, the Ninth Circuit held that Section 1305 did not preempt compensatory damages for breach of contract claims resulting from a challenge to airline overbooking practices, but *did* preempt punitive damages for the same conduct. Recognizing that punitive damages serve regulatory ends, the *West* court held that punitive damages seek to punish airlines for "accepted forms of price competition," and thus "relate to" rates and services within the meaning of Section 1305. 995 F.2d at 152. In the present case, the Illinois Supreme Court held that *both* compensatory *and* punitive damages were not sufficiently "related to" airline rates, routes, or services because they did not have a regulatory effect. The punitive damages preserved by the Illinois Supreme Court would plainly be preempted in the Ninth Circuit.³⁵

³⁵ Other circuits have held that Section 1305 preempts damage awards as well as injunctive relief, without specifically considering whether the preemption analysis should differ depending on the form of relief requested. *E.g. O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989); *Anderson v. US Air, Inc.*, 818 F.2d 49 (D.C. Cir. 1987). The Illinois Supreme Court's ruling conflicts with those decisions as well.

* * * * *

This case presents a better vehicle than *West* (petition and cross petition pending, Nos. 93-803, 93-901) to address these issues. The Illinois Supreme Court's ruling raises the specific questions identified in the petition and cross-petition for certiorari in *West*—whether compensatory damages “relate to rates, routes, or services,” and whether Section 1305 preempts punitive damages even if compensatory damages are not preempted. But the Illinois Supreme Court's ruling also raises the closely related, but broader and more important question whether Section 1305 should apply differently to damage awards than to injunctive relief. Thus, in this case the Court can resolve all issues involving the relevance under Section 1305 of the form of relief requested. In addition, the present case directly raises the question on which the Fifth and Ninth Circuits are in conflict: whether Section 1305 preempts all claims relating to the contractual relationship between the passenger and the airline, or only some subset of those claims. Although *West* may be resolved by the specific interpretation of a particular federal regulation unique to overbooking (the conduct at issue in *West*), this case involves no such complicating factor and thus presents the issues cleanly.

III. THE ILLINOIS SUPREME COURT'S RULING CREATES DIVERGENT FEDERAL AND STATE REGULATORY POLICIES FOR FREQUENT FLYER PROGRAMS, AND DEPARTS FROM THE UNITED STATES DEPARTMENT OF TRANSPORTATION'S INTERPRETATION OF SECTION 1305.

In 1992 the Department of Transportation issued an opinion and order that (a) rejected a complaint brought under Section 411 of the Federal Aviation Act³⁶ challenging certain features of airline frequent flyer programs, and (b) dismissed a request for rulemaking under Section

³⁶ Section 411 of the Act, 49 U.S.C. § 1381, authorizes the Department to prohibit “unfair or deceptive practices” in the provision of air transportation.

411 relating to the same issues. DOT Order No. 92-5-60 (May 29, 1992); App. 85a. The complaint alleged that several airlines had engaged in deceptive and unfair trade practices by failing to provide reasonably adequate notice that they reserved the right to adjust frequent flyer award levels and to impose capacity controls and blackout dates. App. 86a-87a. In support of those claims the complaining parties argued that the airline practices violated the NAAG Guidelines for frequent flyer programs. App. 88a.

The DOT determined that the claims were unsupported. There was no evidence of “actual or potential deception” and no showing that “the actual notice given by any carrier is in fact inadequate.” App. 97a. DOT noted that “the carriers use their [frequent flyer] programs as a means of competing for passengers” and that “[s]ince the programs began, each carrier has greatly *expanded* the kinds of awards that members can obtain and the ways in which members can accumulate award miles in order to make its program more attractive.” App. 99a (emphasis added). DOT specifically found that the challenged program features—adjusting award levels, and imposing capacity controls and blackout dates—are not unfair to consumers. To the contrary, these features “appear to be legitimate methods for controlling the cost of frequent flyer programs,” without which airlines might be forced to curtail or eliminate such programs, to the great detriment of consumers. App. 100a. As this Court has recently made clear, DOT's views regarding the reasonableness of airline competitive practices warrant “substantial deference” because DOT “is equipped, *as courts are not*, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances.” *Northwest Airlines, Inc. v. County of Kent*, No. 92-97, 1994 WL 13651, at *6 (January 24, 1994) (Slip Op. at 9-11) (emphasis added).

The decision of the Illinois Supreme Court, however, permits state court damages challenges to the same fea-

tures of frequent flyer programs that were endorsed in the DOT proceedings. Because challenges to an airline's operation of frequent flyer programs will be resolved differently under state consumer fraud statutes (which incorporate the NAAG Guidelines) than under the federal consumer fraud provision applicable to airlines, complaints against frequent flyer practices will certainly be channelled to state courts, with the result that state and federal policies will be in direct conflict.

The DOT's 1992 order is powerful additional evidence that the Illinois Supreme Court has misinterpreted Section 1305, and seriously undermined the goals of the Airline Deregulation Act. In *Morales* this Court recognized that Section 1305 was intended to "ensure that the States would not undo federal deregulation" through the application of their own laws. 112 S. Ct. at 2034. Permitting individual States to punish and deter airline conduct DOT has viewed with approval strikes at the heart of the congressional objectives, and threatens to destroy the interstate "uniformity" for "rates, routes, and services" that is critical to the congressional plan.

Furthermore, DOT plainly indicated, if it did not hold, that Section 1305 would preempt the challenges at issue in that proceeding had they been raised as state law breach of contract claims. As DOT stated:

state contract laws of general applicability cannot authorize a determination of whether individual terms and conditions of a carrier's [frequent flyer] program are fair and reasonable to the extent they relate to an airline's rates, routes or services. Such state regulation is pre-empted under section 105 [49 U.S.C. § 1305] of the Act.

App. 102a.³⁷ DOT's interpretation of the preemptive scope of Section 1305 is entitled to substantial deference. See

³⁷ DOT adopted this interpretation of Section 1305 in response to the argument that federal rules for frequent flyer programs

Massachusetts v. Morash, 490 U.S. 107, 116-17 (1989) (deferring to agency interpretation of ERISA preemption language). Accordingly, DOT's order confirms what the statutory text and this Court's ruling in *Morales* make plain: the Illinois Supreme Court's reading of Section 1305 is insupportable and creates an intolerable conflict with federal policy.

CONCLUSION

The petition for certiorari should be granted, and the judgment of the Illinois Supreme Court should be summarily reversed. Alternatively, the case should be set for plenary consideration.

Respectfully submitted,

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February 8, 1994

were needed to avoid inconsistent patchwork regulation by the States through statutory and common law claims. The claimants argued that absent federal regulation, state courts might "in effect regulate the [frequent flyer] programs through their adjudication of individual contract suits," resulting "in each state having its own rules." DOT determined, however, that uniform federal regulation was not necessary because Section 1305 would preempt such state claims, and would thus prevent the development of a body of inconsistent and conflicting obligations under state law. App. 102a.

APPENDICES

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APPENDIX A

SUPREME COURT OF ILLINOIS

Docket No. 71418—Agenda 9—May 1993

MYRON (MIKE) WOLENS *et al.*,
Appellees,

v.

AMERICAN AIRLINES, INC.,
Appellant.

JUSTICE BILANDIC delivered the opinion of the court:

This cause comes to us on remand from the United States Supreme Court for further consideration in light of the decision in *Morales v. Trans World Airlines, Inc.* (1992), 504 U.S. —, 119 L. Ed. 2d 157, 112 S. Ct. 2031.

In 1988, plaintiffs filed a class action in the circuit court of Cook County on behalf of participants in American's "AAdvantage" frequent flyer program. Under the program, American awards mileage credits to participating frequent flyers who receive free or discounted flights and other travel benefits based upon their accumulated mileage credits. The complaint alleged that American's retroactive modification of the rules of the AAdvantage program constituted a breach of contract with plaintiffs and all others who joined the program prior to May 1988, and violated the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (Ill. Rev. Stat. 1987, ch. 121½, par. 261 *et seq.*). Plaintiffs sought money damages and an injunction preventing retroactive application to mileage credits earned prior to the changes.

The trial court denied defendant's motion to dismiss, finding that section 1305 did not preempt plaintiffs' claims; however, the trial court granted American's motion for certification for interlocutory review pursuant to our Rule 308 (184 Ill. 2d R. 308). The appellate court concluded that plaintiffs' attempt to enjoin American's application of its new AAdvantage program rules would constitute an attempt to regulate the service of an airline and was therefore preempted. (*Wolens v. American Airlines* (1990), 207 Ill. App. 3d 35, 39.) The court found, however, that plaintiffs' damage claims were not barred by section 1305 of the Deregulation Act. *Wolens*, 207 Ill. App. 3d at 39.

The appellate court issued a certificate of importance to permit immediate review by this court pursuant to our Rule 316 (134 Ill. 2d R. 319). This court affirmed the conclusion of the appellate court that plaintiffs' claim for injunctive relief was preempted by section 1305(a)(1) of the Deregulation Act. (*Wolens v. American Airlines, Inc.* (1992), 147 Ill. 2d 367.) Plaintiffs' claim for damages for breach of contract and violation of the Consumer Fraud Act survived, however. Plaintiffs' claim for money damages had only a tangential relation to defendant's rates and services; thus, this court found that the claim was not preempted under section 1305(a)(1).

Following this court's issuance of its opinion in *Wolens*, only American petitioned the United States Supreme Court for a writ of *certiorari*. The Court vacated the judgment of this court, and remanded this cause for further consideration in light of *Morales*. (*American Airlines, Inc. v. Wolens* (1992), — U.S. —, 121 L. Ed. 2d 6, 113 S. Ct. 32.) We find this court's decision addressing plaintiffs' claim for injunctive relief is consistent with the *Morales* ruling, thus, we do not disturb that portion of this court's previous opinion. Therefore, the only issue before this court is whether plaintiffs' claim for money damages for breach of contract and violation of the Consumer Fraud Act are preempted by section 1305(a)(1) of the Deregulation Act.

I

We begin our analysis with a review of the *Morales* decision. In *Morales*, the Supreme Court considered whether section 1305(a)(1) preempted the enforcement of State statutes regulating airline fare advertising based upon guidelines promulgated by the National Association of Attorneys General, which included the Illinois Attorney General.

Section 1305(a)(1) provides in pertinent part:

"[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier * * *." 49 U.S.C. § 1305(a)(1) (1988).

The *Morales* court noted that the ordinary meaning of the phrase "relating to" is a broad one, that is, "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 167, 112 S. Ct. at 2037, quoting Black's Law Dictionary, 1158 (5th ed. 1979).) The Court compared the language in the Deregulation Act to a similarly worded preemption provision found in the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1144(a) (1988), which preempts all State laws "insofar as they . . . relate to any employee benefit plan." (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 167, 112 S. Ct. at 2087, quoting 28 U.S.C. § 1144(a) (1988).) Adopting the same interpretation employed in the ERISA actions, the Court held that State enforcement actions having a "connection with or reference to airline 'rates, routes, or services' are pre-empted under [section] 1305(a)(1)." (Emphasis added.) *Morales*, 504 U.S. at —, 119 L. Ed. 2d at 167-68, 112 S. Ct. at 2037.

While the Court concluded that fare guidelines are preempted under section 1305(a)(1), it nonetheless held that, in spite of such a broad interpretation of the "relates to" language, all State laws would not be preempted. As stated in *Morales*:

"In concluding that the * * * fare advertising guidelines are pre-empted, we do not * * * set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly 'relat[e] to' rates; the connection would obviously be far more tenuous. To adapt to this case our language in *Shaw*, '[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect.'" *Morales*, 504 U.S. at —, 119 L. Ed. 2d at 171-72, 112 S. Ct. at 2040, quoting *Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85, 100 n.21, 77 L. Ed. 2d 490, 503 n.21, 103 S. Ct. 2890, 2901 n.21.

The *Morales* Court found the fare guidelines at issue did not present a borderline question; as such, the Court expressed no view "about where it would be appropriate to draw the line" as to the types of actions that would be preempted by section 1305(a)(1). (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 172, 112 S. Ct. at 2040, quoting *Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85, 100 n.21, 77 L. Ed. 2d 490, 503 n.21, 103 S. Ct. 2890, 2901 n.21.) Moreover, the Court noted, the decision "does not give the airlines *carte blanche* to lie to and to deceive consumers; the [Department of Transportation] retains the power to prohibit advertisements which in its opinion do not further competitive pricing." (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 172, 112 S. Ct. at 2040. See also 49 U.S.C. app. § 1381 (1988) (granting the Department of Transportation authority to investigate unfair trade practices in the airline industry).

The *Morales* Court concluded that the guidelines regarding airline fare advertising were expressly preempted by section 1305(a)(1). The Court found that the obligations imposed by the guidelines would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares charged. (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 171, 112 S. Ct. at 2040.) Thus, since the guidelines related directly to airline rates, the Attorneys General were precluded from enforcing the guidelines against the airlines.

II

Morales instructs that, in order to determine whether the plaintiffs' claims for breach of contract and violation of the Consumer Fraud Act are preempted, we must decide whether those claims have a "connection with or reference to airline 'rates, routes, or services.'" (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 167-68, 112 S. Ct. at 2037, quoting 49 U.S.C. app. § 1305(a) (1988).) As noted, however, the *Morales* Court expressly stated that certain State actions may be too tenuously or remotely related to an airlines' rates, routes, or services to have a preemptive effect. (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 172, 112 S. Ct. at 2040.) It appears, therefore, that the *Morales* Court intended to leave open the possibility that certain State law actions that had only a slight connection to an airlines' rates, routes, or services, would not be preempted by section 1305(a)(1).

In their complaint, plaintiffs contend that the AAdvantage frequent flyer program was developed as a marketing device for the purpose of encouraging greater use of airline facilities by the general public and, more particularly, by frequent travelers. Prior to May 18, 1988, plaintiffs were entitled to redeem their AAdvantage award certificates for free air travel on any available date to applicable destinations for any available seat in the class of service provided. After that time, American retroactively altered the terms of its contract with the AAdvantage

program members by instituting various restrictions on previously earned AAdvantage credits. Plaintiffs do not challenge American's right to alter or restrict aspects of the AAdvantage program prospectively; however, they contend that American never reserved the right to make such changes retroactive so as to diminish the value of previously earned AAdvantage credits.

Pursuant to *Morales*, we find that the claims at issue do not relate to the rates, routes, or services of an airline. A frequent flyer program is not an essential element to the operation of an airline. Indeed, the airline industry functioned successfully for decades prior to providing incentives to its travelers in the form of frequent flyer programs. As noted in Chief Justice Miller's special concurrence to our previous opinion, plaintiffs' claims do not seek to "establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide." (*Wolens*, 147 Ill. 2d at 377.) Instead, the plaintiffs here seek only money damages for breach of contract and violation of the Consumer Fraud Act after American implemented retroactive changes to the terms of its frequent flyer program.

When a member earns frequent flyer miles by flying on American or by doing business with American affiliates, a contractual relationship is formed which vests the frequent flyer with the right to earn specific travel awards. American chose to retroactively alter the terms of the frequent flyer program. This action constituted a breach of contract which entitled plaintiffs to pursue an available remedy. 12A Ill. L. & Prac. *Contracts* § 391 (1983).

Accordingly, we conclude that our previous holding, that plaintiffs' claims for money damages was not preempted because it bears only a tangential relation to airline rates, routes, and services, comports with the *Morales* decision. As defined, the word "tangential" is described as: "touching lightly or in the most *tenuous* way: Incidental." (Emphasis added.) (*Webster's Third New In-*

ternational Dictionary 2337 (1986).) In view of our finding that frequent flyer programs are peripheral to the operation of an airline, it follows that plaintiff's State law claims for money damages bear only a tangential, or tenuous, relation to American's rates, routes, and services.

For the foregoing reasons, we find that plaintiffs' claims for breach of contract and violation of the Consumer Fraud Act are not preempted by section 1305(a)(1) of the Deregulation Act. The claims are excluded by the exception carved out in *Morales* for actions only tenuously connected to the airlines' rates, routes, and services. Therefore, the judgment of the appellate court affirming the circuit court's denial of American's motion to dismiss under section 2—615 of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110, par. 2—615) is affirmed.

Appellate court affirmed.

JUSTICE FREEMAN took no part in the consideration or decision of this case.

JUSTICE McMORROW, dissenting:

I respectfully dissent because, in my view, under the reasoning and holding of the *Morales* case, plaintiffs' claims for damages under the Consumer Fraud Act and for breach of contract are preempted by section 1305 (a)(1) of the Airline Deregulation Act.

I

In 1987 and 1988, the National Association of Attorneys General (NAAG) drafted detailed standards governing the advertising and marketing practices of the airline industry. The purpose of the guidelines, according to the NAAG, was to "explain in detail how existing state laws apply to air fare advertising and frequent flyer programs." (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 175, 112 S. Ct. at 2041 (appendix, NAAG Guidelines, Introduction (1988).) Notwithstanding objections to the guidelines, on preemption and policy grounds, by the Depart-

ment of Transportation and by the Federal Trade Commission, seven members of the NAAG sent memoranda to the airlines stating that the practice of not disclosing all surcharges in airlines fare advertisements was a violation of the members' respective State laws on deceptive advertising and trade practices. Some months later, the Texas Attorney General's office sent the airlines notice of its intent to sue under Texas' statute prohibiting deceptive advertising and trade practices for the airlines' failure to disclose all surcharges in their advertisements. The airlines filed suit in the district court seeking declaratory judgment and injunctive relief from any action by Texas in conjunction with the NAAG guidelines on the basis that section 1305(a)(1) expressly preempted actions to enforce State deceptive advertising laws.

As noted by the majority, in analyzing the language of section 1305 prohibiting the States from enacting or enforcing "any law relating to the rates, routes, or services of any air carrier," the *Morales* Court imparted a broad definition to the phrase "relating to." The *Morales* Court additionally observed that ERISA's similarly worded preemption provision (29 U.S.C. § 1144(a) (1988)) had repeatedly been recognized as having a "broad scope" and an "expansive sweep" and being "conspicuous for its breadth." (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 167, 112 S. Ct. at 2037, quoting *Metropolitan Life Insurance Co. v. Massachusetts* (1985), 471 U.S. 724, 739, 85 L. Ed. 2d 728, 739-40, 105 S. Ct. 2380, 2388-89; *Pilot Life Insurance Co. v. Dedeaux* (1987), 481 U.S. 41, 47, 95 L. Ed. 2d 39, 48, 107 S. Ct. 1549, 1553; *FMC Corp. v. Holliday* (1990), 496 U.S. 52, 58, 112 L. Ed. 2d 356, 364, 111 S. Ct. 405, 407.) The Court noted that it has been held that a State law "relates to" an employee benefit plan and is preempted by ERISA "if it has a connection with or reference to such a plan." (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 167, 112 S. Ct. at 2037, quoting *Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 95, 97, 77 L. Ed. 2d 490, 501, 103 S. Ct. 2890, 2900.) The *Morales* Court determined that

because the relevant language of section 1305(a)(1) of the Deregulation Act is identical to the preemption clause in ERISA, it should be given the same broad interpretation. The *Morales* Court thus held that State enforcement actions having a connection with or reference to airline rates, routes, or services are preempted under section 1305(a)(1). *Morales*, 504 U.S. at —, 119 L. Ed. 2d at 167-68, 112 S. Ct. at 2037.

The Court rejected the argument that its ruling should be limited to State laws expressly addressing the airline industry (the position taken by this court in the original *Wolens* opinion), reasoning that such a limitation would create "an utterly irrational loophole * * * [which] ignores the sweep of the 'relating to' language." (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 169, 112 S. Ct. at 2035.) The Court noted that it had consistently rejected the same argument in ERISA cases, having held that "[a] state law may 'relate to' a benefit plan, and thereby be preempted even if the law is not specifically designed to affect such plans, or the effect [sic] is only indirect." *Morales*, 504 U.S. at —, 119 L. Ed. 2d at 169, 112 S. Ct. at 2038, quoting *Ingersoll-Rand Co. v. McClendon* (1990), 498 U.S. 133, 139, 112 L. Ed. 2d 474, 484, 111 S. Ct. 478, 483.

The *Morales* Court also rejected a contention essentially the same as that made by Justice Miller in his special concurrence to this court's previous opinion and now adopted by the majority, that plaintiffs' claims are not preempted because they do not seek to "establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide." (Slip op. at 4, quoting *Wolens*, 147 Ill. 2d at 377.) The *Morales* Court observed that the argument that section 1305(a)(1) only preempts the States from actually prescribing rates, routes, or services "simply reads the words 'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to 'regulate' rates, routes,

and services.' " (Emphasis in original.) *Morales*, 504 U.S. at —, 119 L. Ed. 2d at 168, 112 S. Ct. at 2037.

The Court then examined the NAAG guidelines on fare advertising and concluded that they "quite obviously" related to fares. In addition to requiring that all restrictions and surcharges be disclosed clearly and conspicuously, the guidelines also mandated that an advertised fare be available in sufficient quantities to meet reasonably foreseeable demand on every flight on every day in every market in which the fare is advertised or that the advertisement prominently state the extent of the unavailability. The Court found that each guideline bore a reference to air fares, and that under the Texas statute "violations of these requirements would give consumers a cause of action (for at least actual damages [citation]) for an airline's failure to provide a particular advertised fare—effectively creating an enforceable right to that fare when the advertisement fails to include the mandated explanations and disclaimers." (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 170, 112 S. Ct. at 2039.) Continuing, the *Morales* Court compared the case before it to *Pilot Life Insurance Co.*, 481 U.S. 41, 95 L. Ed. 2d 39, 107 S. Ct. 1649 which "held that a common-law tort and contract action seeking damages for the failure of an employee benefit plan to pay benefits 'relate[d] to' employee benefit plans and was preempted by ERISA." (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 170, 112 S. Ct. at 2039.) Beyond the guidelines' express reference to fares, the *Morales* Court found that the obligations imposed by the guidelines "would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge." *Morales*, 504 U.S. at —, 119 L. Ed. 2d at 171, 112 S. Ct. at 2040.

Although the *Morales* Court held that the NAAG guidelines were preempted by section 1305(a)(1), the Court pointed out that the Department of Transportation retains the power to prohibit deceptive advertising practices. (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 172,

112 S. Ct. at 2040.) Under section 411 of the Federal Aviation Act (49 U.S.C. app. § 1381 (1988)), the Department has the authority to investigate and determine whether any air carrier is or has been engaged in unfair or deceptive practices and to order the air carrier to cease and desist from such practices.

II

In the instant case, plaintiffs' complaints consist of two separate claims, one under the Consumer Fraud Act and one for breach of contract. Illinois' Consumer Fraud Act makes unlawful "unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact * * * in the conduct of any trade or commerce." (Ill. Rev. Stat. 1987, ch. 121½, par. 262.) The Act authorizes the Attorney General or a State's Attorney to bring an action to restrain by injunction the unfair act or practices, and to seek civil penalties against any person found by the court to have engaged in an unlawful act or practice. (Ill. Rev. Stat. 1987, ch. 121½, par. 267.) Like the Texas consumer protection statute sought to be enforced in *Morales*, the Illinois Consumer Fraud Act also allows individuals to bring actions for damages for violations of its provisions. Ill. Rev. Stat. 1987, ch. 121½, par. 270(a).

Plaintiffs' consumer fraud claims sought an injunction and both actual and punitive damages. In their complaints plaintiffs allege that American solicited the use of its airline by "featuring" its AAdvantage program in mailings and in the distribution of promotional materials which contained a delineation of the mileage credits required to obtain specific benefits, and that through these materials American induced persons to join the AAdvantage program. Plaintiffs further allege that they were

induced by American's solicitations and promises to believe that by accumulating mileage credits they would receive correspondingly greater travel benefits. Plaintiffs allege that American offered these inducements even though it knew that it would change the terms of the program and institute capacity control restrictions which would have the effect of substantially reducing the value of accumulated mileage credits, and that American never advised plaintiffs that it believed it had reserved the right to retroactively restrict or otherwise reduce or alter the benefits available under the program.

When reduced to their simplest terms, plaintiffs' claims for damages, including punitive damages, under the Consumer Fraud Act are based upon allegations of American's deceptive advertising, promotions, and inducements relating to airline fares (*i.e.*, payment of travel fares with mileage credits and upgrades in seating class) and services (*i.e.*, the quantity of seats and flights and the dates of travel to various destinations) which would be available to persons who joined and participated in the AAdvantage program.

Plaintiffs' allegations virtually mirror the restrictions regarding the advertising of frequent flyer benefits and the institution of capacity controls and other frequent flyer program modifications without advance notice which were proposed in the NAAG guidelines on frequent flyer programs. (*Morales*, 504 U.S. at —, 119 L. Ed. 2d at 173, 112 S. Ct. at 2041 (appendix, NAAG Guidelines).) Although *Morales* involved those of the guidelines relating to advertisements of discounted fares rather than of frequent flyer program benefits; as in *Morales*, plaintiffs in the case at bar seek an adjudication that American's advertising of and representations concerning frequent flyer fares and services constituted unfair and deceptive practices, in violation of State law. *Morales* held that actions seeking to enforce State consumer protection statutes referring and relating to fares and services are ex-

pressly preempted by section 1305(a)(1). *Cf. Hastalis v. Human Rights Comm'n* (1990), 205 Ill. App. 3d 50 (plaintiff's discrimination complaint under the Illinois Human Rights Act related to services of the airline and was preempted by section 1305(a)(1)).

Applying *Morales'* expansive and sweeping interpretation of the phrase "relating to," I believe that plaintiffs' claims for compensatory and punitive damages based on allegations of common law breach of contract are likewise preempted by section 1305(a)(1). Plaintiffs allege that prior to May 1988, AAdvantage members, numbering approximately four million persons, were entitled to redeem their award certificates for free air travel on any available date to applicable destinations for any available seat in the class of service provided. Although plaintiffs maintain that they are not attempting to mandate enforcement of the pre-May 1988 terms of the AAdvantage program, in order to prevail on their breach of contract claims plaintiffs must obtain a State-court adjudication that American is contractually obligated to continue to redeem mileage credits earned prior to May 1988 for the same free fares and unrestricted seating and flight services which the AAdvantage program provided up until that time. Such a finding is necessary whether plaintiffs seek to enforce the terms and conditions of the program or an award of money damages for American's alleged breach of those contractual obligations.

I find it significant that the *Morales* Court several times cited to the decision in *Pilot Life Insurance Co.*, 481 U.S. 41, 95 L. Ed. 2d 39, 107 S. Ct. 1549. In that case, the plaintiff brought suit seeking damages for common law tort and breach of contract based upon the insurance company's improper processing of his claim for and failure to pay disability benefits on the group insurance policy purchased with matching funds of the employer and employees. The Court held that the common law causes of action raised in the plaintiff's complaint "undoubtedly meet

the criteria for preemption" under the "relating to" language in ERISA's preemption clause. This court reached the same conclusion in *Arnold v. Babcock & Wilcox Co.* (1988), 123 Ill. 2d 67. In *Wilcox*, the plaintiffs' employer sold the plant where they worked and the plant subsequently closed. Plaintiffs filed an action for breach of contract to recover severance benefits to which they claimed entitlement under the terms of their employment contract. The complaint also alleged that the failure to pay the benefits constituted a violation of the State statute governing the payment of wages. The court held that the plaintiff's State-law causes of action based on breach of contract and violation of the State wage payment law came within the broad scope of ERISA's preemption of any and all laws which relate to an employee benefit plan. *Wilcox*, 123 Ill. 2d at 72-73.

Morales makes clear that the "relating to" language in section 1305(a)(1) is as expansive in its scope as the identical language in ERISA. Several decisions rendered after *Morales* have applied that broad interpretation in cases against airlines. In *Statland v. American Airlines* (7th Cir. July 16, 1993), No. 92-2062, plaintiff bought a ticket which carried a 10% cancellation penalty. When she cancelled the ticket, American retained 10% of the tax she paid in addition to 10% of the ticket price. Plaintiff filed a class action suit that included four State-law claims alleging breach of fiduciary duty, violations of the Consumer Fraud Act, conversion and breach of contract, based upon the airline's alleged wrongful retention of 10% of the tax she paid. The court found it "obvious [that] canceled ticket refunds relate to rates" (*Statland*, slip op. at 5), and that under *Morales*, plaintiff's State statutory and common law claims were preempted by section 1305(a)(1).

In *Schaeffer v. Delta Air Lines, Inc.* (S.D. Cal. September 18, 1992), No. 92-1190-E(LSP), the plaintiff's complaint alleged consumer fraud and breach of contract

for the airline's failure to disclose in mailings to and oral communications with frequent flyer program members an increase in mileage requirements necessary to obtain a free flight. The complaint was found to be legally and factually deficient. The court stated, however, that even if the pleading deficiencies could be corrected by amendment, the action could not be sustained under the broad definition ascribed to the phrase "relates to" in *Morales*. The court found that the allegations *related to* both the advertisements and services of an airlines, and thus were preempted under section 1305(a)(1).

In *Vail v. Pan Am Corp.* (1992), 260 N.J. Super. 292, 616 A.2d 523, plaintiffs brought an action alleging fraud, consumer fraud, and breach of contract, charging that the airline falsely advertised that it was initiating an enhanced security program and charged \$5 per ticket to defray the costs of the program when, in fact, the airline did not provide any such program. The complaint sought, *inter alia*, a refund of the \$5 surcharge. Plaintiff argued that her claims were merely traditional actions for fraud and breach of contract which could have only a remote effect upon the rates and services of the airline. The *Vail* court found the broad interpretation given to section 1305(a)(1) by *Morales* was dispositive of plaintiff's claims, reasoning that if plaintiff's action were allowed, the State would be permitted to determine whether an airline's advertising was false and deceptive and whether the services advertised were in fact provided, and to fashion remedies, including proscribing certain advertising and compelling the airline to repay the surcharge portion of the rate charged. The court determined that plaintiff's claims related to the services and rates of the airlines and were, therefore, preempted under section 1305(a)(1). See also *Cannava v. USAIR, Inc.* (D. Mass. January 7, 1993), No. 91-3003-F (passenger's claims for intentional infliction of emotional distress, violations of State unfair practices statute and breach of an implied contractual obligation to provide courteous service

were preempted under the interpretation ascribed to section 1305(a)(1) in *Morales*).

I do not agree with the majority that plaintiffs' claims bear only a tangential, tenuous, or remote relation to American's rates, routes, and service because they do not seek to establish rates, determine routes or dictate the services American must provide. Plaintiffs' actions seek a State-court determination that American violated the Consumer Fraud Act through deceptive and unfair advertising and promotion of the AAdvantage program. Plaintiff's actions also seek a State-court adjudication that American has a contractual obligation to provide, and plaintiffs have an enforceable right to receive, either certain specific fares, flights and seats in exchange for earned mileage credits, or monetary compensation in lieu thereof. Under the rationale of *Morales* and its progeny, plaintiffs' claims have a connection with and relation to American's rates and services, and are preempted by section 1305(a)(1) of the Deregulation Act.

I further dissent from the majority's statement that American's alteration of the terms of AAdvantage program "constituted a breach of contract which entitled plaintiffs to pursue an available remedy." (Slip op. at 4.) This case is before us on the denial of American's motion to dismiss. Thus, I believe that it is both premature and inappropriate to reach or address the merits of plaintiffs' claims.

APPENDIX B

IN THE SUPREME COURT OF ILLINOIS

No. 71418

MYRON (MIKE) WOLENS *et al.*, ETC.,
Appellees

v.

AMERICAN AIRLINES, INC., ETC.,
Appellant

AC1-89-0918
 TR88CH7554
 TR89CH119

Hon. Arthur L. Dunne, Judge Presiding

ORDER

[Filed Dec. 28, 1993]

This matter has come for consideration upon the motion of appellant to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United

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States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

/s/ Michael A. Bilandic
Justice
Supreme Court of Illinois

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APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 92-249

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, *et al.*

ON WRIT OF CERTIORARI to the Supreme Court of Illinois.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the Supreme Court of Illinois for further consideration in light of *Morales v. Trans World Airlines, Inc.*, 504 U.S. — (1992).

IT IS FURTHER ORDERED that the petitioner, American Airlines, Inc. recover from Myron Wolens, et al., Three Hundred Dollars (\$300.00) for their costs herein expended.

October 5, 1992

APPENDIX D

SUPREME COURT OF ILLINOIS

Docket No. 71418—Agenda 31—September 1991

MYRON (MIKE) WOLENS, *et al.*,
Appellees,

v.

AMERICAN AIRLINES, INC.,
Appellant.

[Filed Mar. 12, 1992]

JUSTICE HEIPLE delivered the opinion of the court:

This issue presented by this appeal stems from an action by plaintiffs against defendant American Airlines concerning benefits accumulated through defendant's frequent flyer program. Following denial of defendant's motion to dismiss, the trial court granted defendant's motion for certification for interlocutory appeal. The appellate court affirmed the order of dismissal. 207 Ill. App. 3d 35.

Plaintiffs are participants in defendant's American Airlines AAdvantage (AAdvantage) frequent flyer program. In 1988 they filed a class action against defendant, alleging that they enrolled in the AAdvantage program pursuant to a national membership campaign by defendant. Once enrolled, plaintiffs received various communications from defendant setting forth the benefits of the program and the mileage credits necessary for receipt of those benefits. Plaintiffs used defendant's airline, and used the facilities of other organizations that participated in the

AAdvantage program, including other airlines, hotels, and car rental companies, in order to accumulate mileage credits for use in the program. According to plaintiffs' complaint, the value of those credits was substantially and adversely affected by defendant, who retroactively reduced and restricted the benefits available, effective May 18, 1988.

Plaintiffs charged that defendant's action in retroactively modifying the rules of the AAdvantage program constituted a breach of defendant's contracts with plaintiffs and all others who joined the program prior to May 1988. The complaint also charged that the defendant's action was in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (Ill. Rev. Stat. 1987, ch. 121½, par. 261 *et seq.*). Plaintiffs sought money damages and an injunction preventing retroactive application of any changes in the program to mileage credits earned prior to the changes.

Defendant initially removed the action to the United States District Court for the Northern District of Illinois, arguing that the suit raised a Federal question exclusively committed to the adjudication of the Federal courts pursuant to section 1305(a)(1) of the Federal Aviation Act (49 U.S.C. § 1305(a)(1) (1988)). The district court remanded the action to the circuit court, concluding that the complaint raised State law contract and fraud claims, and that such claims are not converted into Federal actions by section 1305 or its legislative history. *Wolens v. American Airlines, Inc.* (N.D. Ill., Oct. 25, 1988), No. 88-C-8158.

On remand, defendant moved to dismiss plaintiffs' action and a second similar class action complaint which was filed following the district court decision and consolidated with the original action. Defendant moved to dismiss on the ground that plaintiffs' claims relate to defendant's rates and services and therefore are expressly preempted by section 1305 of the Federal Aviation Act.

Defendant moved to dismiss plaintiffs' Consumer Fraud Act claims on the ground that they are implicitly preempted by Federal regulation. Finally, defendant moved to dismiss plaintiffs' claims in their entirety on the ground that they are barred by the commerce clause because subjecting airlines to State consumer fraud and common law contract claims would impose a burden on interstate commerce.

The circuit court denied defendant's motion to dismiss on March 20, 1989, finding that section 1305 did not preempt plaintiffs' claims. On March 23, 1989, the circuit court granted defendant's motion for certification of the following question for interlocutory review pursuant to Supreme Court Rule 308 (134 Ill. 2d R. 308):

"whether plaintiffs' claims are preempted by the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301-1557, and by the federal regulations promulgated thereunder, and precluded under the Commerce Clause of the United States Constitution?"

The appellate court answered the question in the negative, and affirmed the decision of the trial court with respect to plaintiffs' breach of contract and Consumer Fraud Act claims, holding that their damage claims are not preempted by section 1305. The Court concluded, however, that the attempt to enjoin defendant's application of its new AAdvantage program rules would be an attempt to regulate the services of an airline and thus a violation of section 1305. The appellate court issued a certificate of importance to permit immediate review by this court, and this court assumes jurisdiction pursuant to article VI, section 4(c), of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VI, § 4(c)), and Supreme Court Rule 316 (134 Ill. 2d R. 316). We affirm.

Section 1305(a) provides in part:

"[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule,

regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier * * *." (49 U.S.C. § 1305 (a)(1) (1988).)

Plaintiffs request injunctive relief to halt application of defendant's new AAdvantage program rules. As the appellate court correctly concluded, injunctive relief would involve the regulation of defendant's services and therefore violate section 1305. See *Hingson v. Pacific Southwest Airlines* (9th Cir. 1984), 743 F.2d 1408.

Plaintiffs' claims for damages for breach of contract and violation of the Consumer Fraud Act, however, survive. We adopt the prevailing view, set forth in *West v. Northwest Airlines, Inc.* (9th Cir. 1990), 923 F.2d 657, that "section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services." (923 F.2d at 660. See also *Bieneman v. City of Chicago* (7th Cir. 1988), 864 F.2d 463.) The instant claims bear only a tangential relation to defendant's rates and services and are not expressly preempted.

Defendant also contends that plaintiffs' claims are implicitly preempted under section 1302(a)(7) of the Federal Aviation Act, which states that the prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation shall be considered in the public interest and in accordance with the public convenience. Proof of implied preemption requires defendant to demonstrate that Congress intended to occupy the field and give Federal law exclusive authority. (*West v. Northwest Airlines, Inc.*, 923 F.2d at 661.) Nothing in the language of section 1302(a)(7) indicates an intent to foreclose State damage claims against an airline for engaging in deceptive practices. *New York v. Trans World Airlines* (S.D.N.Y. 1989), 738 F.Supp. 162.

Additionally, section 1506 of the Federal Aviation Act provides:

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (49 U.S.C. app. § 1506 (1988).)

This language indicates that Congress did not intend to occupy the field, but rather that common law remedies were intended to survive. (*Bieneman v. City of Chicago*, 864 F.2d at 471; *West v. Northwest Airlines, Inc.*, 923 F.2d at 661.) Plaintiffs' claims are not implicitly preempted.

Finally, defendant argues that plaintiffs' claims are barred by the commerce clause. Injunctive relief, defendant contends, will result in State regulation of interstate commerce. In light of our conclusion that an attempt to enjoin defendant's actions regarding the AAdvantage program would constitute improper State regulation preempted by section 1305, further discussion of defendant's commerce clause argument is unnecessary.

Federal and State courts have repeatedly refused to interpret the Federal Aviation Act so as to preempt all State laws. Courts have carefully and narrowly construed the applicable law so as to preempt only those State laws and regulations that specifically relate to and have more than a tangential connection with an airline's rates, routes or services. These courts have recognized that Congress did not intend section 1305 to be construed as a blanket preemption provision, and we join in this conclusion. While plaintiffs' claims for injunctive relief are expressly preempted by the language of section 1305, their damage claims for breach of contract and violation of the Consumer Fraud Act survive.

Accordingly, the circuit and appellate court decisions are affirmed.

Judgments affirmed.

JUSTICES CLARK and FREEMAN took no part in the consideration or decision of this case.

CHIEF JUSTICE MILLER, specially concurring:

The majority concludes that section 1305(a)(1) of the Federal Aviation Act (49 U.S.C. § 1305(a)(1) (1988)) does not expressly preempt the plaintiffs' State-law-based claims for damages. As the sole support for this holding, the majority opinion asserts that the Federal statute preempts only State laws that are specifically directed at the airline industry and does not affect laws of general application, like those at issue here. Although I agree with the majority's conclusion, I cannot subscribe to its rationale.

Unlike the majority, I am not persuaded that Federal preemption exclusively turns on a determination of whether the State law at issue is general or specific in its focus and operation. Although State laws specifically addressing activity that is the subject of an express preemption provision will be preempted (see *Mackey v. Lanier Collections Agency & Service, Inc.* (1988), 486 U.S. 825, 829-30, 100 L. Ed. 2d 836, 843-44, 108 S. Ct. 2182, 2185), not every State law having general application is automatically saved from preemption. Indeed, one apparent and unsustainable consequence of the majority's reasoning would be to shield from preemption all common law actions and remedies, which by their nature have general application. The general nature of a State law can be a circumstance arguing against preemption, but that characteristic alone will not be determinative. See *Ingersoll-Rand Co. v. McClendon* (1990), 498 U.S. —, —, 112 L. Ed. 2d 474, 484, 111 S. Ct. 478, 483.

One need not look far to find, in this or other contexts, Federal preemption of State or other local laws having general application. For example, statutes or common law remedies, even though not aimed directly or entirely at airlines, may not be used to control the seating of aircraft passengers. (See *O'Carroll v. American Air-*

lines, Inc. (5th Cir. 1989), 863 F.2d 11; *Anderson v. USAir, Inc.* (D.C. Cir. 1987), 818 F.2d 49; *Hingson v. Pacific Southwest Airlines* (9th Cir. 1984), 743 F.2d 1408; *Hastalis v. Human Rights Comm'n* (1990), 205 Ill. App. 3d 50.) These cases surely demonstrate that not every law of general application will survive Federal preemption, and thus the majority's proffered distinction between laws of general application and laws of specific application fails to provide a reliable guide for resolving preemption questions. If this distinction is useful at all, it is only because a law's general application supplies a necessary, though not a sufficient, predicate for a finding of no preemption.

Federal preemption of State laws may occur in three ways. First, State law may be expressly preempted, by an explicit Congressional statement to that effect. (*Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85, 95, 77 L. Ed. 2d 490, 500, 103 S. Ct. 2890, 2899). Second, State law may be implicitly preempted, as when Congress has occupied a field so extensively that any State regulation would be inconsistent with the comprehensive Federal scheme. (*Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152.) Third, State law will be preempted when it actually conflicts with Federal law. A conflict will be found when compliance with both Federal and State provisions is impossible (*Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 257, 83 S. Ct. 1210, 1217), or when the State law stands as an obstacle to the full accomplishment of the Federal purpose (*Hines v. Davidowitz* (1941), 312 U.S. 52, 67, 85 L. Ed. 581, 587, 61 S. Ct. 399, 404). Determining whether State law is preempted by Federal law is solely a question of Congressional intent. (*California Federal Savings & Loan Association v. Guerra* (1987), 479 U.S. 272, 280, 93 L. Ed. 2d 613, 623, 107 S. Ct. 683, 689.) In this regard, we may consider the presumption against

preemption in areas of law traditionally regulated by the States. (*Metropolitan Life Insurance Co. v. Massachusetts* (1985), 471 U.S. 724, 740, 85 L. Ed. 2d 728, 740-41, 105 S. Ct. 2380, 2389; *Federal Express Corp. v. California Public Utilities Comm'n* (9th Cir. 1991), 936 F.2d 1075, 1078; *West v. Northwest Airlines, Inc.* (9th Cir. 1990), 923 F.2d 657, 659.) "But when Congress has 'unmistakably . . . ordained' [citation] that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall." *Jones v. Rath Packing Co.* (1977), 430 U.S. 519, 525, 51 L. Ed. 2d 604, 614, 97 S. Ct. 1305, 1309.

The Federal Aviation Act contains an express preemption provision, and the principal question before us is whether the challenged State laws and remedies at issue here fall within its scope. Section 1305(a)(1) of the Act provides, in pertinent part:

"[N]o State or political subdivision thereof * * * shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier * * *." (49 U.S.C. § 1305(a)(1) (1988).)

As construed by the courts, section 1305(a)(1) does not preempt every State-law-based claim affecting airlines and their operations. See *Air Transport Association of America v. Public Utilities Comm'n* (9th Cir. 1987), 833 F.2d 200, 207; see also *Federal Express Corp. v. California Public Utilities Comm'n* (9th Cir. 1991), 936 F.2d 1075, 1078 ("[D]espite the very broad and apparently all-inclusive language of [section 1305(a)(1)], common sense and common practice have forbidden that the statute be taken literally and have restricted its range").

The preemption provision was enacted as part of the Airline Deregulation Act of 1978 (Pub. L. 95-504, 92 Stat. 1708 (1978)) and later codified as section 1305 of

the Federal Aviation Act. In the Airline Deregulation Act, Congress significantly altered the dynamics of the airline industry by substantially reducing, though not completely eliminating, the Federal regulatory apparatus that had previously limited competition among air carriers. It seems clear, then, that a primary purpose of the preemption provision contained in the 1978 amendatory act was to prevent the States from attempting to regulate air carriers, by imposing their own potentially conflicting requirements, after Congress had deregulated the airline industry. (*New England Legal Foundation v. Massachusetts Port Authority* (1st Cir. 1989), 883 F.2d 157, 173; Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. Air L. & Com. 747, 755-56 (1979).) This is not to suggest that the range of State activity preempted by section 1305(a)(1) is necessarily coextensive with the regulatory apparatus dismantled in 1978. But Congress, having decided to exit the business of regulating air carriers' rates, routes, and services, surely wanted to forbid the States to attempt to fill that regulatory vacuum, and I would construe the preemption provision in that light.

If the principal objective of section 1305(a)(1) is to bar State economic regulation of air carriers (*Federal Express Corp. v. California Public Utilities Comm'n* (9th Cir. 1991), 936 F.2d 1075, 1078-79), then it must be concluded that the claims raised here fall outside the intended reach of that provision. The plaintiffs allege breach of contract and violations of the Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1989, ch. 121½, pars. 261 through 272). By their complaints, the plaintiffs seek to enforce certain State-law-based statutory and common law rights. These claims are not regulatory in force or effect. They do not establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide. The plaintiffs' claims do not threaten the defendant airline with economic regulation, which Congress intended

to prevent the States from imposing on a deregulated airline industry. The plaintiffs seek only to enforce their statutory and common law remedies for the defendant airline's alleged breach of its self-imposed obligations. For these reasons, I would conclude that the plaintiffs' damage claims are not expressly preempted by section 1305(a)(1) of the Federal Aviation Act.

One further consideration that counsels against an overly expansive reading of the preemption provision is found in the savings clause of section 1506 of the Federal Aviation Act. Section 1506 provides:

"Nothing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (49 U.S.C. § 1506 (1988).)

The savings clause was part of the Federal Aviation Act prior to 1978, and the clause was retained by Congress notwithstanding the adoption of the preemption provision contained in the Airline Deregulation Act. As the majority opinion correctly concludes, the savings clause preserves, against implied preemption, State-law claims that are not specifically preempted by section 1305(a)(1). (*Trans World Airlines, Inc. v. Mattox* (5th Cir. 1990), 897 F.2d 773, 783, *appeal after remand* (1991), 924 F.2d 1055, *cert. granted* (1991), — U.S. —, 116 L. Ed. 2d 601, 112 S. Ct. 632; *Illinois Corporate Travel, Inc. v. American Airlines, Inc.* (7th Cir. 1989), 889 F.2d 751, 754.) By retaining the savings clause at the same time it added the preemption provision, Congress apparently believed that some statutory and common law remedies (see, e.g., *Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978); *Braunswasser v. Trans World Airlines, Inc.* (W.D. Pa. 1982), 541 F. Supp. 1338) would in fact survive the enactment of section 1305(a)(1).

As a final matter, I question the majority's conclusion that the plaintiffs' requests for injunctive relief are preempted even though their claims for money damages are not. The majority applies the same distinction adopted by the appellate court in the present case (207 Ill. App. 3d 35, 39). It is not clear, however, that the two forms of relief are so readily distinguishable for preemption purposes. See *International Paper Co. v. Ouellette* (1987), 479 U.S. 481, 498 n.19, 93 L. Ed. 2d 883, 901 n.19, 107 S. Ct. 805, 815 n.19.) In any event, in the absence of a finding that the plaintiffs properly allege claims for which injunctive relief may be awarded, I believe it is premature to attempt to determine in this interlocutory appeal whether that form of relief would be preempted by Federal law. The question whether the plaintiffs may obtain injunctive relief under the Consumer Fraud and Deceptive Business Practices Act has not been raised in this court and thus is not before us. If, as the appellate court concluded, private actions for injunctive relief are not available under the Act (207 Ill. App. 3d at 39), we would have no occasion to consider in this case the preemptive effect of section 1305(a)(1) on that portion of the plaintiffs' action.

For the reasons stated, I concur in the court's judgment.

APPENDIX E

ILLINOIS APPELLATE COURT
THIRD DIVISION

December 12, 1990

No. 1-89-0918

MYRON (MIKE) WOLENS, ALBERT J. GALE,
R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON,
individually and on behalf of others similarly situated,
Plaintiffs-Appellees,
v.

AMERICAN AIRLINES, a foreign corporation,
Defendant-Appellant.

P.S. TUCKER, on behalf of herself and
all others similarly situated,
Plaintiff-Appellee,
v.

AMERICAN AIRLINES, a foreign corporation,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County
Honorable Arthur L. Dunne, Judge Presiding

JUSTICE WHITE delivered the opinion of the court.
Defendant American Airlines has filed this interlocutory appeal from an order of the circuit court denying

defendant's motion to dismiss plaintiffs' complaints. Defendant contends that plaintiffs' claims are preempted by federal law and barred by the Commerce Clause.

In 1988, plaintiffs Myron Wolens, Albert Gale, R. Craig Zafis, Bret Maxwell, and Robert Nelson filed a class action complaint against defendant in the circuit court of Cook County. The complaint alleged that in 1981 or 1982, defendant created the American Airlines AAdvantage frequent flyer program and solicited public membership in the program through advertisement in the national media and general mailings. Plaintiffs alleged that this solicitation constituted a unilateral contract offer which they accepted when they joined the program sometime prior to 1988.

Plaintiffs alleged that after joining the program and receiving materials from defendant detailing the available benefits and the mileage credits required therefor, they accumulated mileage credits by using the airlines and facilities of defendant and of those participating with defendant, even if other less costly or more convenient services were available. Plaintiffs further alleged that the value of their credits was substantially and adversely affected when, on May 18, 1988, defendant unilaterally instituted a retroactive reduction in the benefits available in exchange for the credits.

Plaintiffs charged that defendant's action in unilaterally and retroactively reducing program benefits constituted a breach of defendant's contracts with plaintiffs and all others who joined the program prior to May 1988. Plaintiffs also charged that defendant's action was in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"). (Ill. Rev. Stat. 1988, ch. 121½, pars. 261 *et seq.*) Plaintiffs sought monetary damages and an injunction preventing retroactive application of any changes in the program to mileage credits earned prior to such changes.

Defendant removed the action to the United States District Court for the Northern District of Illinois on the ground that the complaint raised a federal question exclusively committed to adjudication in the federal courts by section 105(a)(1) of the Federal Aviation Act. (49 U.S.C. § 1305(a)(1).) The district court remanded the action to the circuit court finding that plaintiffs' complaint was grounded in state law and that nothing in section 1305 or its legislative history indicated a congressional intent to convert plaintiffs' state contract and fraud claims into federal actions removable to federal court. *Wolens v. American Airlines, Inc.*, No. 88-C-8158 (N.D. Ill., Oct. 25, 1988).

Subsequent to the district court's order remanding the action to the circuit court, a second class action complaint was filed against defendant by P. S. Tucker. The second complaint, like the first, alleged that defendant's action in retroactively modifying the rules of the frequent flyer program constituted a breach of contract and violated the Consumer Fraud Act.

The two actions were consolidated and defendant moved to dismiss both contending that the causes of actions were expressly preempted by section 1305(a). Defendant also argued that plaintiffs' actions were barred by the Commerce Clause because subjecting airlines to state consumer fraud and common law contract claims would impose a burden on interstate commerce.

On March 20, 1989, the circuit court entered a memorandum opinion and order denying defendant's motion to dismiss. The court found that section 1305 did not preempt plaintiffs' claims and that nothing in the record indicated that prosecution of plaintiffs' claims would burden interstate commerce.

On March 23, the court granted defendant's motion for certification of a question for interlocutory appeal. The question certified for appeal was: "Whether plaintiffs' claims are preempted by the Federal Aviation Act

of 1958, as amended, 49 U.S.C. §§ 1301-1557, and by the federal regulations promulgated thereunder, and precluded under the Commerce Clause of the United States Constitution?" We conclude that this question must be answered in the negative.

OPINION

The United States Supreme Court acknowledged in *Wardair Canada v. Florida Department of Revenue* (1986), 477 U.S. 1, 106 S.Ct. 2369, 91 L.Ed. 2d 1, that Congress had regulated aviation extensively. However, the Court also pointed out that State law is not preempted whenever there is any federal regulation of an activity or industry. 477 U.S. at 6.

There are three instances where federal law will be found to preempt State law: (1) where Congress has expressly preempted state law; (2) where congressional intent to preempt may be inferred from the pervasiveness of the federal regulatory scheme; and (3) when state law conflicts with federal law or interferes with the achievement of congressional objectives. (*West v. Northwest Airlines, Inc.*, No. 89-35820 (9th Cir. September 11, 1990; *O'Carroll v. American Airlines, Inc.* (5th Cir. 1989), 863 F.2d 11.) In the case before us, defendant contends that plaintiffs' claims are expressly preempted by section 1305. Defendant also contends that section 1305 and its legislative history demonstrate a Congressional intent to occupy the entire field and exercise exclusive federal control over aviation matters. Finally, defendant argues that the Commerce Clause bars plaintiffs' claims.

I. Express Preemption

Section 1305(a) provides that:

"[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule,

regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier * * *."

Defendant argues that all of plaintiffs' claims are directly related to defendant's rates or services and, therefore, are preempted.

Plaintiffs' breach of contract and Consumer Fraud Act claims seek to recover damages for the loss in value of their mileage credits. Plaintiffs also request orders enjoining defendant from applying any subsequent changes in the frequent flyer program to plaintiffs.

Initially we note that private actions for injunctive relief may not be maintained under the Consumer Fraud Act. *Martin v. Eggert* (1988), 174 Ill. App. 3d 71, 528 N.E.2d 386.) In addition, we find that any attempt to enjoin defendant's application of its new program rules would be an attempt to regulate the services of an airline and thus a violation of section 1305. See *Hingson v. Pacific Southwest Airlines* (9th Cir. 1984), 743 F.2d 1408; *Anderson v. USAir, Inc.* (D.D.C. 1985), 619 F.Supp. 1191, aff'd 818 F.Supp. 49.

However, we also find that plaintiffs' claims for damages for breach of contract and violation of the Consumer Fraud Act are not preempted by section 1305. See *Beineman v. Chicago* (7th Cir. 1988), 864 F.2d 463; *Hingson v. Pacific Southwest Airlines; In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975* (2nd Cir. 1980), 635 F.2d 67; *Wolst v. American Airlines, Inc.* (N.D.Ill. 1987), 668 F.Supp. 1117; *Anderson v. USAir, Inc.; Brunwasser v. Trans World Airlines, Inc.* (W.D.Pa. 1982), 541 F.Supp. 1338.

In *Anderson* and *Hingson*, blind plaintiffs brought suit alleging that the defendant airlines' policy of excluding blind persons from occupying certain seats on aircraft violated local laws providing equal access for and precluding discrimination against the handicapped. The court of appeals in *Hingson* and the federal district court

in *Anderson* both held that the state laws in question were preempted by section 1305. The courts stated that the term "services" as used in section 1305 included the regulation of air carrier seating policies for handicapped persons. *Hingson*, 743 F.2d at 1415-16; *Anderson*, 619 F.Supp. at 1198.

However, the courts in *Hingson* and *Anderson* also found that the blind plaintiffs' common law claims for damages for intentional infliction of emotional distress were not preempted by section 1305. (*Hingson*, 743 F.2d at 1416; *Anderson*, 619 F.Supp. at 1197.) Several other courts have also concluded that common law actions for damages are not preempted by section 1305. See *West v. Northwest Airlines, Inc.*; *Bieneman v. Chicago*, 864 F.2d at 471; *In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 635 F.2d at 74; *Holliday v. Bell Helicopters Textron, Inc.*, No. 88-00904 (D.Hawaii, Oct. 12, 1990); *New York v. Trans World Airlines, Inc.* (S.D.N.Y. 1989), 728 F.Supp. 162; *Illinois Corporate Travel, Inc. v. American Airlines, Inc.* (N.D.Ill. 1988), 682 F.Supp. 378, 380 n.1, aff'd 889 F.2d 752; *Wolst v. American Airlines, Inc.* (N.D.Ill. 1987), 668 F.Supp. at 1119; *Brunwasser v. Trans World Airlines, Inc.* (W.D.Penn. 1982), 541 F.Supp. at 1345; *Stream Aviation, Inc. v. Anders Production, Inc.* (La. 1987), 517 So.2d 1157; *People v. Western Airlines, Inc.* (1984), 155 Cal.App.3d 597.

We are aware that some courts have reached an opposite conclusion. (See *Mattox v. Trans World Airlines, Inc.* (5th Cir. 1990), 897 F.2d 773; and *O'Carroll v. American Airlines, Inc.*, both holding that common law claims against an airline were preempted by section 1305.) However, we believe that the better reasoned view is that expressed in *West v. Northwest Airlines, Inc.* There, the ninth circuit court of appeals stated:

"We disagree with *Northwest* and the district court that 'law[s] . . . relating to airline services' encom-

passes all state laws that affect airline services, however tangentially. This interpretation of § 1305 (a)(1) would unduly expand preemption and ignore our presumption against federal preemption in this traditional state law area. Instead, we find that Section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving air services. Thus, *state laws that merely have an effect on airline services are not preempted* (emphasis added)."

The claims for damages in the present case arise out of plaintiffs' contracts with defendant. The claims bear only a tangential relation to defendant's rates and services and any effect that an award of damages would have on defendant's rates and services would be remote and indirect. (*New York v. Trans World Airlines, Inc.*, 728 F.Supp. at 176; and see *Nader v. Allegheny Airlines* (1976), 426 U.S. 290, 300, 96 S.Ct. 1978, 48 L.Ed.2d 643 (holding that any impact on rates that may result from the imposition of common law tort liability or from practices adopted by a carrier to avoid such liability would be incidental); and *Beineman v. Chicago*, 864 F.2d at 471 (pointing out that State courts award damages every day in air crash cases notwithstanding the fact the federal law preempts State regulation of safety in air travel).) Accordingly, we conclude that section 1305 does not expressly preempt plaintiffs' actions for damages for breach of contract and violation of the Consumer Fraud Act.

II. Implied Preemption

Defendant argues that the extensive regulation of the field of aviation by Congress and the Department of Transportation demonstrate congressional intent to occupy the entire field. Defendant bases its argument on sections 102(a)(7) and 411 of the Federal Aviation Act (49 U.S.C. §§ 1302(a)(7), 1381) and the provisions of

the Civil Aeronautics Board Sunset Act of 1984 ("Sunset Act") (P.L. No. 98-443, 98 Stat. 1703). Defendant argues that these authorities establish that Congress intended that the Department of Transportation have exclusive authority for regulating advertising and preventing deceptive practices by airlines. We disagree.

Section 1302(a)(7) states only that the prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation shall be considered in the public interest and in accordance with the public convenience. Nothing in its language gives rise to an inference that section 1302(a)(7) was intended to foreclose State damage actions against an airline for engaging in deceptive practices. See *New York v. Trans World Airlines*, 728 F.Supp. at 177.

Turning to defendant's argument that section 1381 indicates a congressional intent to preclude State consumer protection claims, we note that a similar argument was rejected by the Supreme Court in *Nader v. Allegheny Airlines*. There, the Court held that section 1381 did not eliminate state court common law or statutory claims against airlines for fraud; rather, the Court ruled that such claims were preserved by section 1106 of the Federal Aviation Act (49 U.S.C. § 1506). *Nader*, 426 U.S. at 300.

Section 1506 provides that:

"Nothing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

The Supreme Court found that section 1381 was intended, not to preclude, but to supplement the compensatory common law remedies for private parties preserved under section 1506. *Nader*, 426 U.S. at 300-1.

Defendant contends that the *Nader* decision cannot be considered as controlling because the decision predated the Sunset Act of 1984. Defendant argues that a state-

ment in the legislative history of the Sunset Act, that the Act preempts State regulation of consumer protection and unfair competitive practices, indicates that Congress intended to preempt plaintiffs' claims.¹

As our earlier discussion points out, an award of damages for breach of contract or violation of the Consumer Fraud Act does not amount to "State regulation." Further, Congress in passing the Sunset Act in 1984, is presumed to have been aware of the Supreme Court's 1976 holding in *Nader* that section 1506 preserved State common law claims for fraud. Thus, Congress's retention of section 1506 following passage of the Sunset Act, indicates its tacit approval of the Supreme Court's decision. Accordingly, we find that Congress did not intend the Sunset Act to preempt plaintiffs' state law damage claims.

III. Commerce Clause

Defendant argues that the circuit court erred in holding that the Commerce Clause did not bar plaintiffs' claims. Defendant contends that by seeking an injunction in an Illinois court that will require defendant to provide specific services to its frequent flyer program members nationwide, plaintiffs are attempting to regulate interstate commerce.

In our discussion above, we pointed out that plaintiffs could not maintain a private action for injunctive relief under the Consumer Fraud Act and that any attempt to

¹ The statements defendant relies on are contained in House Report 793 (H.R. 793, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. Code Cong. & Admin. News 2857, 2858.) The House Report provides that:

"In addition, to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines."

enjoin defendant's action would constitute improper State regulation of the activities of an airline. In light of the foregoing, defendant's arguments that an injunction would violate the Commerce Clause are moot.

In conclusion, we find that although plaintiffs' claims for injunctive relief are expressly preempted by section 1305, plaintiffs' common law and statutory damage claims are neither expressly or implicitly preempted. Accordingly, the order of the circuit court denying defendant's motion to dismiss is affirmed.

AFFIRMED.

RIZZI and FREEMAN,* JJ., concurring.

* JUSTICE FREEMAN concurred in this opinion prior to his election to the Illinois Supreme Court.

APPENDIX F

**IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

88 CH 7554

consolidated with: 89 CH 119

JUDGE ARTHUR L. DUNNE, Presiding

MYRON (MIKE) WOLENS, *et al.*,
Plaintiff,

v.

AMERICAN AIRLINES, INC.,
Defendant.

P.S. TUCKER,
Plaintiff,

v.

AMERICAN AIRLINES,
Defendant.

MEMORANDUM OPINION AND ORDER

[Entered Mar. 20, 1989]

The complaints in these consolidated cases in sum allege that changes in American Airline's ("AA") frequent flyer program, "AAdvantage", constitute a breach of contract. The plaintiffs seek damages and injunctive relief on behalf of themselves individually and on behalf of others similarly situated pursuant to the Illinois Con-

sumer Fraud and Deceptive Business Practice Act, Ill. REV.STAT. ch. 121½, para. 261-272 (1987).

In both cases AA has filed identical motions to dismiss. Consequently, this opinion and order applies to both cases. AA's motions to dismiss contend in summary that these complaints are preempted by the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1301-1557, its accompanying federal regulations and by the Commerce Clause of the United States Constitution. Specifically, AA contends that 49 U.S.C. sec. 1305(a) expressly preempts any statutory or common law cause of action which would afford plaintiff relief and that Congress intended to remove the states from any regulation of airlines. In addition, the defendant argues that the Commerce Clause bars this action because to subject airlines to the state consumer fraud and contract law would impose a burden which materially affects interstate commerce in an area previously regulated by federal law. United States Constitution, Article I, section 8, cl. 3.

In response, the plaintiffs argue that 49 U.S.C. sec. 1506 allows these state causes of action and that the AA's reading of sec. 1305 is unduly expansive, i.e., this action is not a regulation of "rates, routes or services." Moreover, Congress did not intend to preempt all state remedies. The Commerce Clause does not bar prosecution of these actions.

I.

These motions raise a question of statutory interpretation. What is the affect of the apparent conflict between 49 U.S.C. sec. 1305(a) and sec. 1506? Sec. 1506, enacted August 23, 1958, reads as follows: "Nothing in this chapter (same chapter as section 1305) shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." As far as this court can determine, sec. 1506 has not been explicitly repealed

by any subsequent act of Congress. However, in 1978, Congress enacted the Airline Deregulation Act, Pub. L. No. 95-505, 92 Stat. 1705. As part thereof, Congress enacted 49 U.S.C. sec. 1305(a)(1) which reads in part: "... no state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or service of any air carrier. . . ."

Sec. 1506 makes the general statement that the remedies of the Federal Aviation Act are not exclusive. Sec. 1305 apparently contradicts that by preempting state regulation. However, on closer reading, sec. 1305 preempts only those state enactments or the enforcement of state laws which "relate to rates, routes and other services." Sec. 1506 is a general rule. Sec. 1305 is a specific exception to the general rule. Reading sec. 1506 and section 1305 together it appears that state remedies are available except to the extent that those laws relate to rates, routes, or services. The issue is whether the plaintiff's enforcement of the Illinois consumer fraud claim and common law contract claim relate to rates or services.

This court can find no reported case, state or federal, which has decided this issue. However, AA cites *Rivkin v. Northwest Airlines*, No. 88 CH 2637 (Circuit Court of Cook County, Dec. 8, 1988, as amended Dec. 15, 1988). As of this date, a motion to reconsider the interlocutory *Rivkin* decision pends. There is no collateral estoppel effect by *Rivkin*. *Colbe v. Chicago Health Club, Inc.* 53 Ill.App.3d 1019 (1st Dist. 1977). The analysis of *Rivkin* is persuasive at best. However, this court is unpersuaded. In *Rivkin*, Judge Hall determined that the Northwest frequent flyer program related to rates because an affidavit of Northwest Airlines stated that the cost of the frequent flyer program was factored into the determination of rates. There is no such affidavit in the instant case. Even assuming arguendo the existence of such affidavit, this Court rejects the *Rivkin* reasoning. Such

an interpretation would have the exception swallow the rule. This court will not apply such a broad reading of "relating to rates, routes or services." Assuming AA passed on the cost of the frequent flyer program, it would be ludicrous to propose that anything which might contribute to a determination of fare becomes the subject of preemption. Surely airlines take into account the cost of tort claims when fixing rates, yet no one would dispute the state court's jurisdiction to hear tort cases filed against an airline. *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988). To preempt enforcement of the consumer fraud act or a common law contract would afford AA an "impenetrable immunity" from enforcement of its contracts. See *Owen v. City of Atlanta*, 157 Ga. App. 354, 277 S.E.2d 338 (1981), *aff'd* 248 Ga. 299, 282 S.E.2d 906, *cert. denied*, 456 U.S. 972, 72 L. Ed.2d 846, 102 S.Ct. 2285 (1982).

II.

AA argues that Congress transferred consumer related responsibilities from the Civil Aeronautics Board to the Department of Transportation ("DOT") citing 49 U.S.C. sec. 1302(a)(7), sec. 1381(a) and that DOT has exclusive power over consumer matters. This court finds no statutory authority for that argument. Sec. 1302(a)(7) says that the Board shall consider the prevention of unfair, deceptive, predatory or anticompetitive practices in air transportation. This is hardly the type of regulation that would give rise to implicit preemption. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). Sec. 1506 specifically states that the remedies in (this act) are not exclusive. The Illinois Consumer Fraud Act is a remedy that is not excluded under Sec. 1506.

III.

Finally, AA argues that prosecution of the plaintiffs' consumer fraud and contract actions constitute state regulations which materially affect interstate commerce

in a regulated area in violation of the Commerce Clause. AA's attempt to remove this case to the federal court was unsuccessful. *Wolens v. American Airlines*, No. 88 C 8158 (N.D. Ill. Oct. 24, 1988) Judge Nordberg Presiding. This court finds no evidence in the record of any effect on interstate commerce. AA has submitted no affidavit in support of that proposition. In light of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) and the lack of evidence of a burden on interstate commerce the court finds that prosecution of these actions is not precluded by the Commerce Clause of the United States.

CONCLUSION AND ORDER

The defendant's motions to dismiss are denied for the above stated reasons.

IT IS HEREBY ORDERED that the defendant shall have 10 days to answer or otherwise plead to the consolidated complaints. Following this court's hearing in the pending 2-615 [illegible] motion.

/s/ Arthur L. Dunne
JUDGE ARTHUR L. DUNNE

DATE: March 20, 1989

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

88 CH 7554

consolidated with: 89 CH 119

JUDGE ARTHUR L. DUNNE, Presiding

MYRON (MIKE) WOLENS, *et al.*,
Plaintiff,

v.

AMERICAN AIRLINES, INC.,
Defendant.

P.S. TUCKER,
Plaintiff,

v.

AMERICAN AIRLINES,
Defendant.

ORDER

[Entered Mar. 21, 1989]

THIS CAUSE COMING ON TO BE HEARD on Defendant's Motion to Dismiss the Complaints, as consolidated, pursuant to Sec. 2-619 of the Illinois Code of Civil Procedure, the Court having heard arguments of counsel and having examined Memoranda of Law and otherwise being fully advised in the premises;

IT IS HEREBY ORDERED

1. Defendant's Motions to Dismiss pursuant to Sec. 2-619 of the Illinois Code of Civil Procedure are

denied for the reasons set forth in the Court's Memorandum Opinion and Order.

2. Plaintiffs shall have leave to file a brief in opposition to Defendant's 2-615 Motion to Strike, limited to 12 pages, within 14 days hereof.
3. Defendant shall have leave to file a Reply brief, limited to 12 pages, within 14 days thereafter.
4. Hearing on Defendant's 2-615 Motion to Strike is set for May 2, 1989, at 11:00 a.m., without further notice.
5. Defendant shall file an answer to the Complaint within 10 days thereafter, on or before May 12, 1989.

Atty No. 90513

Name Gilbert W. Gordon

MARKS, MARKS AND KAPLAN, LTD.
Attorney for Plaintiffs

Address 30 N. LaSalle St., #3040

City Chicago, IL 60602

Telephone (312) 332-5200

ENTER:

/s/ Arthur L. Dunne
Judge

APPENDIX G

IN THE CIRCUIT COURT
OF COOK COUNTY ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

—————
No. 88CH7554

MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG
ZAFIS, BRET MAXWELL and ROBERT NELSON, individ-
ually and on behalf of all others similarly situated,

Plaintiffs,
v.

AMERICAN AIRLINES, INC., a foreign corporation,
Defendant.
—————

JURY DEMANDED ON ALL ISSUES AT LAW
—————

CLASS ACTION COMPLAINT
FOR INJUNCTIVE AND OTHER RELIEF

NOW COME the Plaintiffs, MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of a class of persons similarly situated, and complaining of the Defendant, AMERICAN AIRLINES, INC., a foreign corporation ("AMERICAN"), state as follows:

COUNT 1
(IN CHANCERY)

THE CLASS ACTION

1. Defendant operates a domestic and international airline which is authorized to do and does business in the County of Cook and State of Illinois. As a marketing

device for the purpose of encouraging greater use of its airline facilities by the general public, and more particularly, by frequent airline travelers, it created in 1981 or 1982 a program known as the American AAdvantage Program ("PROGRAM"). Other companies such as other airlines, hotels, and car rental companies also participated with Defendant in the Program. AMERICAN, in consideration for use of its airline and/or the services or facilities of other participants with Defendant in the Program, awarded mileage credits which the traveler was both permitted and induced to accumulate and exchange for a variety of travel and other benefits, the greater the number of mileage credits earned and accumulated, the greater the available benefits for which they could be exchanged.

2. Defendant solicited use of its airline by the general public and, more particularly, by frequent travelers, by featuring its Program in diverse national media and by general mailings and distribution of promotional materials which included applications for membership in the Program, a list of benefits and facilities available, and a delineation of the mileage credits required to obtain the specifically listed benefits. To persons who joined the Program, Defendant sent further explanatory materials detailing the available benefits and the mileage credits required therefor. The greater the number of mileage credits a member accumulated, the greater the benefits he was entitled to receive.

3. Prior to May 18, 1988, each of the named Plaintiffs accepted Defendant's offer, joined the Program, used Defendant's airline, even if more costly or less convenient than others, and/or used the services and facilities of others participating with Defendant in the Program, and received and accumulated mileage credits for the miles so traveled and services and facilities so used.

4. The class which the named Plaintiffs represent consists of persons of the United States who, like the named

Plaintiffs, also joined the Program prior to May 18, 1988, traveled upon Defendant's airline and/or used the services and facilities of other participants in the Program and, as of May 18, 1988, accumulated mileage credits which they still retain. The value of those credits was substantially and adversely affected by Defendant who, effective May 18, 1988, retroactively reduced the benefits theretofore available for said credits, by instituting capacity control restrictions which significantly limit the number of seats available for passengers that wish to pay for travel with Program travel awards.

5. The class of persons affected by the foregoing is so numerous, consisting of millions of persons, that joinder of all members of said class is impracticable.

6. There are questions of both fact and law common to the class, which common questions predominate over any questions affecting only individual members of the class, to wit: each and every class member as did each named Plaintiff, prior to May 18, 1988, by accepting Defendant's aforesaid offer, becoming members of the Program and traveling upon the Defendant airline and/or using the services of other participants in the Program for which they were entitled to mileage credits, accumulated substantial mileage credits which they still retain but the value of which credits, just as was the value of the mileage credits held by the named Plaintiffs, was substantial and adversely affected by Defendant's aforesaid conduct. Whether such conduct of the Defendant was a breach of contract and/or a violation of the Illinois Consumer Fraud and Deceptive Business Practice Act (Ill. Anno. Stats. Ch. 121½ Section 261, *et seq.*) is common to the rights of all members of the class.

7. The named Plaintiffs and their attorneys will fairly and adequately protect the interests of the class in that the named Plaintiffs like all other members of the class had substantial mileage credits in the Program accumulated prior to May 18, 1988, which were adversely af-

ected by Defendant's aforesaid action in a like manner, though not necessarily to the same extent, as all other members of the class.

8. A class action is the most fair, just and efficient manner in which to adjudicate the claims arising out of the aforesaid conduct of the Defendant. Should individual actions be brought, or be required to be brought by each individual Plaintiff, a multiplicity of lawsuits would result and cause undue hardship and expense for the Court and the litigants.

9. The prosecution of separate actions by individual members of the Plaintiff class would also create a risk of inconsistent or varying adjudications and rulings with respect to individual members of the class. Additionally, the prosecution of separate actions against the Defendant would create a risk of rulings which might be dispositive of the interests of other class members not parties to the adjudications or substantially impede their ability to protect their interests.

STATEMENT OF CLAIM

10. Defendant's aforesaid solicitation constituted a unilateral offer by Defendant to each named Plaintiff and class member which each said Plaintiff and class member prior to May 18, 1988, accepted by joining the Program, traveling on the Defendant's airline and/or using the facilities and services of other participants in the Program, and thereby, earned mileage credits under the Program which the Defendant, by increasing the available benefits as the accumulated mileage increased, induced them to retain, increase and accumulate.

11. As such mileage credits were earned and accumulated by each named Plaintiff and class member, each said Plaintiff and class member accrued a contractual right to receive from Defendant and Defendant became contractually obligated to furnish to each such Plaintiff and class

member, the benefits to which said mileage credits were entitled under the Program in effect when the mileage credits were earned, accrued and accumulated. Defendant could not alter program benefits retroactively as to mileage credits which had theretofore been earned and accumulated under the Program.

12. As heretofore detailed, each of the named Plaintiffs and the class they represent were members of the Program who, prior to May 18, 1988, did, in the manner aforescribed, earn and accumulate substantial mileage credits which they still retain.

13. Prior to May 18, 1988, each named Plaintiff and the members of the class were entitled to redeem their American AAdvantage award certificates for free air travel on any available date to applicable destinations for any available seat in the class of service provided (i.e., first class, coach or economy class).

14. Effective May 18, 1988, Defendant unilaterally altered the benefits available to participants in the Program by instituting capacity control restrictions wherein the Defendant restricted or otherwise limited the opportunity of Program members to redeem their award levels for travel or other benefits offered in the Program and/or limited the opportunity of Program members to earn mileage sufficient for specific award levels. Defendant's implementation of capacity control restrictions included both blackout dates, during which no free flights were available, and the limitation of the maximum number of seats allocated to persons wishing to pay for flights with free travel awards.

15. Defendant's unilateral reduction of the value of benefits for mileage credits earned prior to May 18, 1988, and which each traveler was induced by Defendant as aforescribed to increase, retain and accumulate, was in breach of the contract between the Defendant, on the one hand, and, on the other hand, the named Plaintiffs

and the class members who accepted Defendant's offer by traveling upon Defendant's airline, even if it were more costly and less convenient than other airlines, and/or by using the services of others who participated with Defendant in the Program, and thereby earning and accumulating mileage credits under the Program prior to May 18, 1988, for which they were entitled to the benefits available for such mileage credits prior to May 18, 1988.

16. Unless this Court assumes equitable jurisdiction and otherwise so orders, the Defendant will not only impose capacity control restrictions as to the benefits offered under the Program applicable retroactively to mileage credits earned, accumulated and accrued by each of the named Plaintiffs and members of the class prior to May 18, 1988, but will continue to adopt additional changes which it will similarly retroactively apply and thereby require additional litigation.

WHEREFORE, Plaintiffs, MYRON (MIKE) WOL-
ENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET
MAXWELL and ROBERT NELSON, individually and
on behalf of the class of persons similarly situated, re-
spectively pray this Honorable Court:

- A. To certify this claim as a class action in order that the named Plaintiffs and their attorneys may represent the class of persons similarly situated;
- B. For judgment against the Defendant for damages in the amount that the value of the mileage credits earned and accumulated by the named Plaintiffs and the members of the class prior to May 18, 1988, which they still retain was reduced by reason of the acts of the Defendant aforescribed, together with punitive damages in such sum as shall be deemed fit;

- C. A preliminary and permanent injunction enjoining the Defendant from applying any subsequent changes in the Program Defendant may hereafter make which reduce the benefits available under the Program, to the mileage credits earned, accumulated and accrued prior to any such subsequent changes made by the Defendant;
- D. For an award of costs and reasonable attorney's fees incurred for and on behalf of the named Plaintiffs and members of the class in connection with the prosecution of this cause; and
- E. For such other and further relief as this Court may deem fit to grant in fashioning a remedy for the named Plaintiffs and the class they represent.

COUNT II

(AT LAW)

CLASS ACTION

1-9. Paragraphs 1 through 9, inclusive, of Count I are hereby re-alleged as Paragraphs 1 through 9, inclusive, of this Count II hereof as though set out in full in said Count II.

STATEMENT OF CLAIM

10-15. Paragraphs 10 through 15, inclusive, of Count I are hereby re-alleged as Paragraphs 10 through 15, inclusive, of this Count II hereof as though set out in full in said Count II.

WHEREFORE, Plaintiffs, MYRON (MIKE) WOL-
ENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET
MAXWELL and ROBERT NELSON, individually and
on behalf of the class of persons similarly situated, re-
spectively pray the Honorable Court:

- A. To determine the class and thereupon certify this claim as a class action in order that the

named Plaintiffs and their attorneys may represent the class of persons similarly situated.

- B. For judgment against the Defendant for damages in the amount that the value of the mileage credits earned and accumulated by the named Plaintiffs and the members of the class prior to May 18, 1988, which they still retain was reduced by reason of the acts of the Defendant afore-described, together with punitive damages in such sum as shall be deemed fit.
- C. For an award against the Defendants for costs and reasonable attorney's fees incurred for and on behalf of the named Plaintiffs and members of the class in connection with the prosecution of this cause.
- D. For such other and further relief as this Court may deem fit to grant in fashioning a remedy for the named Plaintiffs and the class they represent.

COUNT III

(IN CHANCERY)

CLASS ACTION

1-9. Paragraphs 1 through 9 inclusive of this Complaint entitled "Class Action" are hereby re-alleged as Paragraphs 1 through 9 inclusive of this Count II hereof as though set out in full in said Count II.

STATEMENT OF CLAIM

10. The named Plaintiffs and each class member prior to May 18, 1988, were led to believe by Defendant's aforesaid solicitations that each, by joining the Program, using the Defendant airline and/or the services and facilities of other participants in the Program, would earn mileage credits which, if accumulated, would entitle each to receive in exchange therefor certificates for free air

travel to applicable destinations for any available date for any available seat in the class of service provided. Defendant, by making greater benefits available for the accumulation of greater mileage credits, induced the said named Plaintiffs and members of the class to increase, hold and accumulate their mileage credits.

11. Accordingly, and in reliance upon the said solicitations, each named Plaintiff and class member, prior to May 18, 1988, joined the Program, traveled on the Defendant's airline and/or used the facilities and services of other participants in the Program and thereby earned mileage credits under the Program, which they accumulated so as to obtain the greater benefits offered therefor. The named Plaintiffs and some class members still retain all of their credits so earned and accumulated.

12-13. Paragraphs 13 and 14 of Count I of this Complaint are hereby re-alleged as Paragraphs 12 and 13 of this Count III hereof as though set out in full in said Count III.

14. During the year 1988, in particular, the Defendant induced each named Plaintiff and class members to fly even more frequently on the Defendant airline by offering "Triple Mileage" for each actual mile flown. Defendant offered "Triple Mileage" even though they knew that they would institute capacity control restrictions which would limit the number of seats available and therefore dilute the value of the mileage credits accumulated.

15. At no time either in its aforesaid solicitations or otherwise, while inducing the named Plaintiffs and the members of the class to earn and, more particularly, to accumulate mileage credits and while said mileage credits were, in fact, being earned and accumulated, did Defendant ever advise the said Plaintiffs and members of the class that Defendant believed that it reserved the right and would whenever it determined that it was in its benefit so to do, retroactively restrict, suspend or otherwise alter or reduce the benefits available under the

Program for mileage credits theretofore earned, accumulated and accrued thereunder, by the implementation of capacity control restrictions or otherwise.

16. As a direct and proximate result of Defendant's aforesaid acts, the mileage credits earned, accumulated and still retained by each named Plaintiff and member of the class prior to May 18, 1988, were substantially reduced in value as were those of member of the class who earned mileage credits prior to May 18, 1988.

17. At all times material to this Complaint, there was in full force and effect, as Sections 261, *et seq.* of Chapter 12½ of the Illinois Annotated Statutes, an Act entitled: "The Consumer Fraud and Deceptive Business Practice Act."

18. The aforesaid wrongful acts and omissions of the Defendant constituted violations of the said Act by which each named Plaintiff and other member of the class suffered damages as aforescribed.

19. Section 10 of the Act authorizes any person who suffers damages as a result of a violation of the Act to bring an action against any other person who committed the act for such relief as the Court deems fit, including reasonable attorney's fees and costs.

20. Each named Plaintiff, member of the class and the Defendant is a "person" as defined by said Act.

21. Paragraph 16 of Count I of this Complaint is re-alleged as Paragraph 20 [sic] of this Count III hereof as though set out in full in said Count III.

WHEREFORE, Plaintiffs, MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of the class of persons similarly situated, respectively pray this Honorable Court:

A. To determine the class and thereupon certify this claim as a class action in order that the named

Plaintiffs and their attorneys may represent the class of persons similarly situated.

- B. For judgment against the Defendant for damages in the amount that the value of the mileage credits earned and accumulated by the named Plaintiffs and the members of the class prior to May 18, 1988, was reduced by reason of the acts of the Defendant aforescribed, together with punitive damages in such sum as shall be deemed fit.
- C. A preliminary and permanent injunction enjoining the Defendant from applying any subsequent changes in the Program Defendant may hereafter make which reduce the benefits available under the Program, to the mileage credits earned, accumulated and accrued prior to any such subsequent changes made by the Defendant, including any limitation of seats of imposition of blackout periods of time.
- D. For an award against the Defendants for costs and reasonable attorney's fees incurred for and on behalf of the named Plaintiffs and members of the class in connection with the prosecution of this cause.
- E. For such other and further relief as this Court may deem fit to grant in fashioning a remedy for the named Plaintiff and the class they represent.

COUNT IV

(AT LAW)

CLASS ACTION

1-9. Paragraphs 1 through 9, inclusive, of Count III of this Complaint are re-alleged as Paragraphs 1 through 9, inclusive, of this Count IV as though set out in full in said Count IV.

STATEMENT OF CLAIM

10-16. Paragraphs 10 through 16, inclusive, of Count III of this Complaint are re-alleged as Paragraphs 10 through 16, inclusive, of this Count IV as though set out in full in said Count IV.

17-21. Paragraphs 17 through 21, inclusive, of Count III of this Complaint are re-alleged as Paragraphs 17 through 21, inclusive, of this Count IV as though set out in full in said Count IV.

WHEREFORE, Plaintiffs, MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of the class of persons similarly situated, respectively pray this Honorable Court:

- A. To determine the class and thereupon certify this claim as a class action in order that the named Plaintiffs and their attorneys may represent the class of persons similarly situated.
- B. For judgment against the Defendant for damages in the amount that the value of the mileage credits earned and accumulated by the named Plaintiffs and the members of the class prior to May 18, 1988, was reduced by reason of the acts of the Defendant aforescribed, together with punitive damages in such sum as shall be deemed fit.
- C. For an award against the Defendants for costs and reasonable attorney's fees incurred for and on behalf of the named Plaintiffs and members of the class in connection with the prosecution of this cause.
- D. For such other further relief as this Court may deem fit to grant in fashioning a remedy for the named Plaintiff and the class they represent.

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MYRON (MIKE) WOLENS, ALBERT J. GAYLE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of all others similarly situated,

By: /s/ [Illegible]
One of their Attorneys

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APPENDIX H

**IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION**

No. 89 CH 119

P. S. TUCKER, on behalf of herself and all others
similarly situated,

Plaintiff,

v.

AMERICAN AIRLINES, INC.,
a foreign corporation,

Defendant.

**JURY TRIAL DEMANDED ON ALL ISSUES
AT LAW
CLASS ACTION**

**CLASS ACTION COMPLAINT FOR
INJUNCTIVE AND OTHER RELIEF**

Now comes the Plaintiff, P. S. Tucker, on behalf of herself and all others similarly situated, complaining against defendant American Airlines, Inc. ("American"), a foreign corporation, as follows:

COUNT I

(IN CHANCERY)

THE CLASS ACTION

1. Defendant operates a domestic and international airline which is authorized to do and does business in the

County of Cook and the State of Illinois. As a marketing device for the purpose of encouraging greater use of its airline facilities by the general public and, more particularly, by frequent airline travelers, defendant created more than 5 years ago a program entitled the "AAdvantage" frequent flyer program ("Program"). Other companies also participated with defendant in the Program, including other airlines, hotel and rental car companies.

2. In consideration for use of defendant's airline and/or the services or facilities of other participants with defendant in the Program, defendant awarded mileage credits which the traveler was both permitted and induced to accumulate and exchange for a variety of travel and other benefits. The greater the number of mileage credits earned and accumulated, the greater the available benefits for which they could be exchanged.

3. Defendant solicited use of its airline by the general public and, more particularly, by frequent travelers, by featuring its Program in diverse national media and by general mailings and distribution of promotional materials, including applications for membership in the Program, a list of benefits and facilities available, and a delineation of the mileage credits required to obtain the specifically listed benefits.

4. To induce persons to join the Program and to fly American and otherwise use the Program, defendant sent further explanatory materials detailing the available benefits and the mileage credits required therefor. The greater the number of mileage credits a member accumulated, the greater the benefits he or she was entitled to receive.

5. Prior to June 1, 1988, the named plaintiff accepted defendant's offer to join the Program; used defendant's airline, even if more costly or less convenient than others; used the services and facilities of others participating with defendant in the Program; and received and accumu-

lated mileage credits for the miles traveled and services and facilities used. As a result, prior to June 1, 1988, plaintiff had accumulated and still retains mileage credits in the Program.

6. Plaintiff brings this action on behalf of herself and a class of persons who joined the Program prior to June 1, 1988, and who accumulated mileage credits as of such date, which they either still retain or plan to use in whole or part after June 1, 1988. The value of those credits was substantially and adversely affected by defendant who, effective June 1, 1988, announced numerous changes in the Program retroactively applicable even to those mileage credits accumulated prior to the changes.

7. The class of persons affected by the foregoing is so numerous, consisting of approximately four million members, that joinder of all members is impracticable.

8. Questions of fact and law common to the Class predominate over questions affecting only individual members of the Class. Common questions of fact and law include the following:

(a) whether defendant breached its contractual obligations when, after plaintiff and each Class member had accepted defendant's offer to join the Program and had travelled upon defendant's airline or used the services of other participants in the Program and had accumulated mileage credits, defendant altered the provisions of the Program so as to substantially and adversely affect each class member's accumulated mileage credits; and

(b) whether defendant violated the Illinois Consumer Fraud and Deceptive Business Practice Act (Ill. Ann. Stat. ch. 121½, § 261, *et seq.*) by the conduct complained of herein.

9. The named Plaintiff and her counsel will fairly and adequately protect the interests of the Class. Plaintiff, like all other members of the Class, had mileage credits

in the Program accumulated prior to June 1, 1988, which were adversely affected by defendant's action in a like manner, though not necessarily to the same extent, as all other members of the Class. Plaintiff is represented by counsel experienced in Class Action litigation.

10. A Class Action is the most fair, just and efficient manner in which to adjudicate the claims arising out of defendant's conduct. Should individual actions be brought, or be required to be brought by each individual member of the Class, the resultant multiplicity of lawsuits would cause undue hardship and expense for the Court and the litigants. The prosecution of separate actions would also create a risk of inconsistent rulings which might be dispositive of the interests of other Class members not parties to the adjudications or substantially impede their ability to protect their interests.

STATEMENT OF CLAIM

11. Through the described solicitation of Class members, defendant made a unilateral offer to plaintiff and each Class member which each accepted by joining the Program prior to June 1, 1988, and by traveling on defendant's airline and/or using the facilities and services of other participants in the Program. As a result, plaintiff and the Class earned mileage credits under the Program which the defendant induced them to retain, increase, and accumulate.

12. As such mileage credits were earned and accumulated by plaintiff and each Class member, each acquired a vested contractual right to receive from defendant, and defendant became contractually obligated to furnish to plaintiff and each Class member, the benefits to which said mileage credits were entitled under the Program in effect when the mileage credits were earned and accumulated. Although defendant reserved the right to restrict, suspend, or otherwise alter aspects of the Program, it could not do so retroactively as to mileage credits which

had theretofore been earned and accumulated under the Program.

13. Among the benefits to which plaintiff and each member of the Class were entitled by reason of the mileage credits earned and accumulated prior to June 1, 1988, were the following: (a) for 12,000 mileage credits accumulated, an upgrade from coach to first class on any one round trip ticket purchased, including discount fare or otherwise restricted tickets with advance purchase requirements tickets; and (b) for varying amounts of mileage credits accumulated, various first class and other class tickets to applicable destinations on available dates for any of a specified number of seats available in that class of service and upgrading of tickets from coach to first class for domestic or international destinations.

14. Effective commencing June 1, 1988, defendant unilaterally commenced a process pursuant to which it is altering the benefits available to participants in the Program, not only with reference to mileage credits earned and accrued thereafter, but also retroactively for all mileage credits which plaintiff and other members of the Class had earned and accumulated prior to June 1, 1988. Furthermore, American's actual and proposed changes are designed to make it substantially harder to earn travel benefits subsequent to July 1, 1989. In addition, American is instituting capacity control restrictions which will make it substantially more difficult for Program members to redeem their mileage credits for the benefits promised to them. These capacity control restrictions include a greater number of blackout dates, during which no flights are available, and limitation of the number of seats allocated to Program members seeking to redeem their mileage credits.

15. American's modified frequent flyer program will have two award levels. One, called Plan AAhead, has lower requirements for benefits but greater restrictions on their use. The other, called AAnytime, requires higher

mileage for benefits but has no blackout dates or other restrictions.

16. In general, travel at peak hours and days—when airlines have the least trouble filling seats—will be available as a frequent flier benefit only in the AAnytime award program.

17. For instance, under the old award structure, it took 50,000 miles to earn two free coach tickets to Hawaii. Under the new structure, it will take 60,000 miles to get two coach tickets under Plan AAhead awards, and 120,000 miles for two AAnytime award tickets.

18. Under the old rules, there are certain blackout dates when awards cannot be used, which was the only major restriction American imposed. In the future, the restricted Plan AAhead awards will be available on "up to 50 percent" of all the available American airliner seats, a substantial reduction for most flights.

19. Another key change reduces the minimum number of miles credited to a member's account for each flight taken, from 750 to 500 or the actual number of miles flown, whichever is greater.

20. Through this unilateral reduction of benefits for mileage credits earned prior to the changes being made and which each traveler was induced by defendant to increase and accumulate, American breached its contract with the plaintiff and each Class member by, *inter alia*, reducing the number of available seats pursuant to which earned mileage credits can be used for benefits, thereby reducing the value of mileage credits accumulated to date and/or to be accumulated.

21. Unless this Court assumes equitable jurisdiction and otherwise so orders, the defendant will not only implement the foregoing changes but will continue to make additional retroactive changes in the benefits offered under the Program.

WHEREFORE, plaintiff, individually and on behalf of the Class of persons similarly situated, asks this Honorable Court:

A. To certify this claim as a Class Action in order that plaintiff and her attorneys may represent the Class of persons similarly situated;

B. For judgment against defendant for damages in the amount that the value of the mileage credits earned and accumulated by plaintiff and members of the Class prior to June 1, 1988 was lessened by virtue of the defendant's conduct, together with such punitive damages as may be found appropriate;

C. To enter a preliminary and permanent injunction enjoining defendant from applying retroactively any of the changes in benefits which it has purported to place into effect, as well as any subsequent changes in the Program which defendant may hereafter make which reduce the benefits available under the Program to mileage credits already earned and accumulated;

D. To award costs and reasonable attorneys' fees incurred on behalf of the plaintiff and members of the Class in connection with the prosecution of this cause; and

E. For such other relief as this Court may deem fit to grant in fashioning a remedy for plaintiff and members of the Class.

COUNT II (AT LAW)

CLASS ACTION

1-9. Paragraphs 1 through 9, inclusive, of Count I are hereby realleged as if fully set forth in Count II.

STATEMENT OF CLAIM

10-21. Paragraphs 10 through 21, inclusive, of Count I are hereby realleged as if fully set forth in Count II.

WHEREFORE, plaintiff, individually and on behalf of the Class of persons similarly situated, asks this Honorable Court:

A. To certify this claim as a Class Action in order that plaintiff and her attorneys may represent the Class of persons similarly situated;

B. For judgment against defendant for damages in the amount that the value of the mileage credits earned and accumulated by plaintiff and members of the Class prior to June 1, 1988 was lessened by virtue of the defendant's conduct, together with such punitive damages as may be found appropriate;

C. To enter a preliminary and permanent injunction enjoining defendant from applying retroactively any of the changes in benefits which it has purported to place into effect, as well as any subsequent changes in the Program which defendant may hereafter make which reduce the benefits available under the Program to mileage credits already earned and accumulated;

D. To award costs and reasonable attorney's fees incurred on behalf of the plaintiff and members of the Class in connection with the prosecution of this cause; and

E. For such other relief as this Court may deem fit to grant in fashioning a remedy for plaintiff and members of the Class.

COUNT III
(IN CHANCERY)

CLASS ACTION

1-9. Paragraphs 1-9, inclusive, of Count I are hereby realleged as if fully set forth in Count III.

STATEMENT OF CLAIM

10. Plaintiff and each member of the Class were induced to believe by defendant's solicitations and promises

that by joining the Program and using defendant's airline and/or the services and facilities of other Program participants, each would earn specified mileage credits which, if accumulated, could be redeemed for specified benefits, including air travel tickets and ticket upgrades. By making greater travel benefits available through redemption of correspondingly greater accumulated mileage credits, defendant induced plaintiff and members of the Class to increase, hold and accumulate their mileage credits.

11. Consequently, plaintiff and members of the Class joined the Program and traveled on defendant's airline and/or used the facilities of other Program participants in order to accumulate the greater mileage credits necessary to obtain correspondingly greater travel benefits.

12. Prior to June 1, 1988, plaintiff and members of the Class were entitled to redeem their accumulated mileage credits for specified travel benefits, such as airline tickets and ticket upgrades from coach to first class.

13. Effective commencing June 1, 1988, defendant unilaterally commenced a process pursuant to which it is altering the benefits available to participants in the Program, not only with reference to mileage credits earned and accrued thereafter, but also retroactively for all mileage credits which plaintiffs and other members of the Class had earned and accumulated prior to June 1, 1988. Furthermore, American's actual and proposed changes are designed to make it substantially harder to earn travel benefits subsequent to July 1, 1989. In addition, American is instituting capacity control restrictions which will make it substantially more difficult for Program members to redeem their mileage credits for the benefits promised to them. These capacity control restrictions include a greater number of blackout dates, during which no flights are available, and limitation of the number of seats allocated to Program members seeking to redeem their mileage credits.

14. During the year 1988, in particular, defendant induced plaintiff and members of the Class to fly even more frequently on defendant's airline by offering "Triple Mileage" for each actual mile flown. Defendant offered "Triple Mileage" even though it knew that it would change the terms of the Program and institute capacity control restrictions which would have the effect of substantially reducing the value of accumulated mileage credits.

15. At no time did defendant—while inducing plaintiff and members of the Class to earn and accumulate mileage credits—ever advise plaintiff and members of the Class that defendant believed it had reserved the right to retroactively restrict, suspend or otherwise alter or reduce the benefits available under the Program and that defendant would take such action whenever it determined that it would be benefitted by so doing.

16. As a direct and proximate result of defendant's conduct complained of herein, the value of the mileage credits earned and accumulated by plaintiff and members of the Class was substantially reduced.

17. At all times relevant and material to this Complaint, there was in full force and effect, as Section 261, *et seq.*, of Chapter 121½ of the Illinois Annotated Statutes, an Act entitled: "The Consumer Fraud and Deceptive Business Practices Act" (the "Act").

18. The foregoing wrongful acts and omissions of defendant constituted violations of the Act which resulted in plaintiff and each member of the Class suffering damages as described above.

19. Section 10 of the Act authorizes any person who suffers damages as a result of a violation of the Act to bring an action against any other person who committed the violation, for such relief as the Court deems fit, including reasonable attorneys' fees and costs.

20. The plaintiff, the members of the Class, and the defendant are each "a person" as defined by the Act.

21. Unless this Court assumes equitable jurisdiction and otherwise so orders, the defendant will not only implement the foregoing changes but will continue to make additional retroactive changes in the benefits offered under the Program.

WHEREFORE, plaintiff, individually and on behalf of the Class of persons similarly situated, asks this Honorable Court:

A. To certify this claim as a Class Action in order that plaintiff and her attorneys may represent the Class of persons similarly situated;

B. For judgment against defendant for damages in the amount that the value of the mileage credits earned and accumulated by plaintiff and members of the Class prior to June 1, 1988 was lessened by virtue of the defendant's conduct, together with such punitive damages as may be found appropriate;

C. To enter a preliminary and permanent injunction enjoining defendant from applying retroactively any of the changes in benefits which it has purported to place into effect, as well as any subsequent changes in the Program which defendant may hereafter make which reduce the benefits available under the Program to mileage credits already earned and accumulated;

D. To award costs and reasonable attorney's fees incurred on behalf of the plaintiff and members of the Class in connection with the prosecution of this cause; and

E. For such other relief as this Court may deem fit to grant in fashioning a remedy for plaintiff and members of the Class.

**COUNT IV
(AT LAW)**

CLASS ACTION

1-9. Paragraphs 1 through 9, inclusive, of Count III are hereby realleged as if fully set forth in Count IV.

STATEMENT OF CLAIM

10-21. Paragraphs 10 through 21, inclusive, of Count III are hereby realleged as if fully set forth in Count IV.

WHEREFORE, plaintiff, individually and on behalf of the Class of persons similarly situated, asks this Honorable Court:

A. To certify this claim as a Class Action in order that plaintiff and her attorneys may represent the Class of persons similarly situated;

B. For judgment against defendant for damages in the amount that the value of the mileage credits earned and accumulated by plaintiff and members of the Class prior to June 1, 1988 was lessened by virtue of the defendant's conduct, together with such punitive damages as may be found appropriate;

C. To enter a preliminary and permanent injunction enjoining defendant from applying retroactively any of the changes in benefits which it has purported to place into effect, as well as any subsequent changes in the Program which defendant may hereafter make which reduce the benefits available under the Program to mileage credits already earned and accumulated;

D. To award costs and reasonable attorney's fees incurred on behalf of the plaintiff and members of the Class in connection with the prosecution of this cause; and

E. For such other relief as this Court may deem fit to grant in fashioning a remedy for plaintiff and members of the Class.

Dated: January 6, 1989.

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APPENDIX I

National Association of Attorneys General,
Task Force on the Air Travel Industry,
Revised Guidelines (Excerpts)

SECTION 3—Frequent Flyer Programs General Comments to Section 3

Frequent flyer programs have been widely acknowledged as the most successful marketing programs in airline industry history. The bargain struck between customers and the airlines has proven to be very costly to many of the airlines. Customers who have accrued the necessary mileage are expecting to collect the awards which led them to join and fly in the programs in the first place. Some airlines are now disturbed by the cost of keeping their side of the bargain and the real possibility that they may lose revenue because passengers flying on frequent flyer awards may begin displacing paying customers. The solution contemplated by some carriers has been to raise award thresholds and implement restrictions to decrease the cost to them of the award program. The effect of these actual and/or potential changes is to significantly devalue vested members' accrued mileage or other credits in the program. Although various frequent flyer program awards materials have contained some obscure mention of the possibility of future program changes, these disclosures have been wholly inadequate to inform program members of the potentially major negative changes which are contemplated by many airlines.

These Guidelines cover frequent flyer programs including any partner airlines or other providers of goods or services such as rental cars and hotel rooms. They are intended to protect those consumers who have participated in these programs in good faith, without adequate notice that the programs could change, and to advise the airlines of how they can reserve this right in the future by adequately providing this information to all members in a nondeceptive manner consistent with state law.

3.0 Capacity controls

1. If an airline or its program partners employ capacity controls, the airline must clearly and conspicuously disclose in its frequent flyer program solicitations, newsletters, rules and other bulletins the specific techniques used by the airline or program partner to control capacity in any solicitation which states a specific award. This includes blackout dates, limits on percentage of seats (for example, "the number of seats on any flight allocated to award recipients is limited"), maximum number of seats or rooms allocated or any other mechanism whereby the airline or program partner limits the opportunities of program members redeeming frequent flyer award levels. To meet this Guideline, all blackout dates must be specifically disclosed.

2. As to awards for vested miles, the airline or program partner must provide the award to the vested member without capacity controls or provide the award with capacity controls within a reasonable period of time. A reasonable period would be within 15 days before or after the date originally requested. If all seats within this 31-day period were sold at the time the vested member requested a reservation, so that the member could not be accommodated without displacing a passenger to whom a seat has been sold, then a reasonable period would be the period to the first available date on which every seat was not sold to the requested destination at the time the program member requests a reservation.

Comment: All of the airlines that met with the Task Force stated that they intended to retain the right to impose capacity controls, in the future, to limit the number of seats available to consumers purchasing tickets with frequent flyer award certificates. The imposition of capacity controls, including blackout dates, has the potential for unreasonably restricting the supply of seats or other benefits in such a way as to significantly devalue the awards due vested program members. NAAG found that this potential limitation has not been adequately dis-

closed to program members in the frequent flyer promotional materials we reviewed. This Guideline puts the airline on notice as to what information they should provide to consumers if they want to impose capacity controls on the use of frequent flyer awards at some future date.

In earlier drafts of the Guidelines the Task Force took the position that capacity controls could not be applied to awards based on any mileage or credits accrued by vested members before they received adequate notice that capacity controls could be imposed. However, as a compromise, and to permit the airlines reasonable flexibility around holiday or other peak travel times, the revised Guideline provides for a reasonable time to accommodate passengers with award tickets: a 31-day "time window"—15 days before and 15 days after the date requested for ticketing. This "time window" allows the airlines to allocate capacity to meet demand over a reasonable, yet defined period of time. In the event all flights to a certain destination are sold out during the entire 31-day time window, ticketing on the next available seat would be reasonable. This approach has the additional benefit of being simple and straightforward to implement with less possibility of customer confusion and frustration.

3.1 Program changes affecting vested members

1. Any airline or program partner that has not reserved the right to make future changes in the manner required by Sections 3.2 and 3.9 of these Guidelines and that changes any aspect of its program (for example, imposition of capacity controls, increases in award levels, or any other mechanism whereby a vested member's ability to redeem any award will be adversely affected) must protect vested program members. Examples which meet this Guideline are:

(a) All vested members may not be adversely affected by that change for a reasonable period [which] would be one year following mailing of notice of that change.

(b) The airline or program partner may allow vested members to lock in any award level which is in effect immediately preceding any change in the program. That award level would be guaranteed for a period of one year after mailing notice of any increase in award levels. A vested member would also be permitted to change his or her selection to lock in a different award in existence at any time prior to an increase in award levels.

(c) The airline or program partner may credit vested program members with miles or other units sufficient to assume that, at the time of any change in the program, the member will be able to claim the same awards he or she could have claimed under the old program.

Comment: This Guideline institutes corrective measures to protect vested members and the mileage they accrued before receiving adequate notice that a program could change to their detriment at some point in the future. The Guideline sets forth three acceptable alternative approaches to allow airlines to change existing programs without unreasonably altering the rights and expectations of vested members. For example, an airline may wish to create a new program with higher award levels for persons who join in the future. Guideline 3.1.1(a) grandfathers in vested members for a one-year period after notice. Guideline 3.1.1(b) grandfathers only a specified locked-in award for a one-year period after the effective date of the change and thereby gives the member an additional year to accrue mileage or units toward a specific award. Guideline 3.1.1(c) allows the program to avoid the administrative problems of distinguishing between old and new members and old and new award levels by equitably adjusting the award levels of the vested members.

These examples are not the only ways in which airlines can reasonably protect vested members when changing existing programs. They are intended to delineate minimum acceptable standards.

3.2 Notice of Changes

1. Adequate notice of changes in current frequent flyer program award levels must be provided to vested program members by the airline or program partner to allow a reasonable time for the vested member to obtain and use an award. For example, a notice no less than one year prior to the effective date of such change would be reasonable. Reduction in award levels would not require such notice. 2. Any airline which has a policy of deleting program members from its mailing list for notices and statements must clearly and conspicuously disclose that policy in plain language in its rules and regulations.

3. To reserve the right to make future changes in the award levels and program conditions or restrictions in a manner providing reasonable notice consistent with state law, which notice is less than the notice set forth in Guideline 3.2.1, an airline must first clearly and conspicuously disclose that reservation and the nature of such future changes, in plain language. This disclosure should include examples which make clear the outer limits within which program awards may be changed. For example, the following is not adequate disclosure:

"Program rules, regulations and mileage levels are subject to change without notice."

This example is adequate disclosure:

"(Airline) reserves the right to terminate the program with six months notice. This means that regardless of the amount you participate in this program, your right to accumulate mileage and claim awards can be terminated six months after we give you notice."

Or:

"(Airline) reserves the right to change the program rules, regulations, and mileage level. This means that (Airline) may raise mileage levels, add an unlimited number of blackout days, or limit the number of seats

available to any or all destinations with notice. Program members may not be able to use awards to certain destinations, or may not be able to obtain certain types of awards such as cruises."

Or, if the airline so intends, the disclosure might also say:

"In any case, (Airline) will make award travel available within — days of a program member's requested date, except for blackout dates listed here."

The airline's right to make future changes, in a manner other than that provided in Guideline 3.1, shall apply only to mileage accrued after members receive the notice required by this Guideline.

Comment: In the past, airlines have attempted to reserve the right to make radical future changes in their programs by using such vague and uncertain blanket language as "Subject to additions, deletions, or revisions at any time." The consumer outrage that ensued when several of the major airlines attempted unilaterally to change their programs in the winter of 1986-87 makes it clear that consumers were not adequately told, when they joined and participated in frequent flyer programs, that they were taking a gamble that the award they were striving for would still be available, at the mileage level originally advertised by the time they accrued the necessary miles. To avoid a recurrence of this same problem in the future, this Guideline provides that the potential for such extensive program changes must be clearly and conspicuously disclosed to the public by specific example. It also puts the airlines on notice that (1) their previous attempts to disclose this critical information have been inadequate (2) if they intend to reserve the right to make such changes in the future, they must give members new and different notice, and (3) as to vested members, airlines cannot implement any adverse changes until one year after notice is given. One year is deemed rea-

sonable because many consumers can only travel during particular periods of the year due to work or family constraints, and therefore notice of less than a year may impact unduly harshly on a particular class of program members.

If an airline wants to reserve the rights to change the terms of its program without giving its members one year's notice (1) it can do so only after clear and adequate notice has been given to the program members and (2) this reduced standard can apply only to mileage accrued after clear and adequate notice has been given.

NAAG discovered that many airlines delete program members from their mailing lists if they are determined to be "inactive." Inactive is defined differently by each airline, but generally includes some formula requiring active participation in the program within a six to ten month period prior to any given mailing. Because crucial information regarding changes is included in program mailings, the Guidelines require that any airline with a policy of deleting program members from its mailing list clearly and conspicuously disclose that policy in the rules and regulations distributed to all program members when they join.

3.3 Fare or passenger class limitations

Any limitation upon the type or class of fare with which an upgrade certificate, discount flight coupon, or free companion coupon may be used must be clearly and conspicuously disclosed before the program member claims the award. Disclosure of the fare by airline terminology (for example, "Y Class") is not deemed sufficient.

Comment: Many airlines are encouraging consumers to use their accrued mileage or credits to obtain upgrade certificates or free campaign coupons, rather than free tickets because this is more cost effective for the airlines. Many of these coupons and certificates can be used only

in conjunction with a regular coach fare ticket. Because of the high cost of a full coach ticket (often disclosed only as "Y Class") many of these coupons and certificates represent no real savings and therefore are useless to consumers. This Guideline requires that any such restriction be clearly disclosed to consumers before the award is claimed.

3.4 Certificates issued for vested miles

Certificates, coupons, vouchers, or tickets issued by an airline for awards redeemed for vested miles must be valid for a reasonable period of time. One year is deemed to be reasonable. Any restrictions on use, redeposit, extension, or re-issuance of certificates must be clearly and conspicuously disclosed on the certificate and in any rules, regulations, newsletter or other program materials.

Comment: Again, because many consumers may only travel during certain periods of the year, fairness requires that awards be valid for at least a full twelve month cycle.

3.5 Fees

Any airline which charges a fee for enrollment in its frequent flyer program must fully disclose at airline ticket counters and in all advertisements, solicitations or other materials distributed to prospective members prior to enrollment all terms and conditions of the frequent flyer program. Such disclosure must be made prior to accepting payment for enrollment in the airline's program.

Comment: Some airlines have required that consumers fill out a membership application and pay a membership fee before obtaining a copy of the program rules and regulations. Because of the serious restrictions that can apply to a travel reward program, it is essential that all consumers have an opportunity to review all of the program rules and regulations before paying an enrollment fee.

3.6 Redemption time

All airlines must disclose clearly and conspicuously the actual time necessary for processing award redemption requests where such requests are not normally processed promptly. An example of prompt processing would be within 14 days of processing the request. An example of a disclosure would be "processing of awards may take up to 30 days."

Comment: The airlines indicated that full disclosure of redemption time will not be a problem.

3.7 Termination of program affecting vested members

In the event a frequent flyer program is terminated, adequate notice of termination must be sent to all vested members so that vested members have a reasonable time to obtain awards and use them. Adequate notice would be notice at least one year prior to the termination of the program. Award levels in existence prior to such notice should remain in effect for one year. Program members should then have one year to use certificates, coupons, vouchers or tickets. Any applicable capacity controls should be modified as necessary to meet the demand for all award benefits due program members.

Comment: The airlines uniformly take the position that because participation in travel reward programs is "free," an airline should be able to terminate a travel reward program at any time without notice. NAAG strenuously disagrees. Consumers pay significant consideration for the airlines' promise to award them "free tickets" and other awards. Program members fly on a particular airline to accrue mileage in a travel reward program often foregoing a more convenient departure time, a more direct flight, and even a less expensive ticket. Those consumers who kept their part of the bargain have a right to expect the airlines to keep theirs, regardless of the cost. This Guideline affords consumers reasonable protection against unilateral changes. It gives consumers one year to accrue the mileage to reach a desired award level and one year to use the award.

This Guideline is intended to apply to programs that are terminated due to mergers or for any other reason. It would be unconscionable to permit airlines, which have reaped the rewards of these travel incentive programs, to walk away from their obligations to consumers under any circumstances.

3.8 Restrictions

All material restrictions on frequent flyer programs must be clearly and conspicuously disclosed to current program members and to prospective members at the time of enrollment.

Comment: This Guideline is intended as a corrective measure. Any airline that has not clearly and conspicuously disclosed material program restrictions to vested members should do so now. New members are entitled to full disclosure at the time of enrollment.

3.9 Method of disclosure

Disclosures referred to in these Guidelines should be made in frequent flyer program solicitations, newsletters, rules, and other bulletins in a clear and conspicuous manner so as to assure that all program members receive adequate notice. As used in these Guidelines, disclosure also refers to information on program partners.

Comment: The brochures containing the rules and regulations for airlines' frequent flyer programs have been as long as 52 pages. Extremely important restrictions are often buried under inappropriate topic headings or hidden on the back of the last inside pages of the brochure. This Guideline requires that restrictions be disclosed in reasonable print size in a location that will be most helpful and informative to consumers.

Any reservation of the right to make future changes in a program is so significant to consumers that it should be disclosed prominently to insure that the maximum

number of people see and read this restriction. The Guideline permits the airlines flexibility to determine when and how often a disclosure must be made so long as the airline discloses the information in a manner which gives meaningful notice to all affected members.

One airline complained that Guideline 3.9 is unreasonable because it proposes that all the restrictions be disclosed at the beginning of the program brochure. In fact, the only disclosure the Guidelines suggested listing at the beginning of a brochure is the reservation of the right to change the program prospectively. The significance of such a restriction—that the terms and conditions of the program can change at any moment—is so critical that potential members should be made aware of it immediately. All other disclosures can be made in the text of the brochure.

APPENDIX J

UNITED STATES OF AMERICA DEPARTMENT OF TRANSPORTATION OFFICE OF THE SECRETARY WASHINGTON, D.C.

Issued by the Department of Transportation
on the 29th day of May, 1992

Docket 46280

COMPLAINT OF ASSOCIATION OF
DISCOUNT TRAVEL BROKERS

against

CONTINENTAL/EASTERN TARIFF, C.A.B. No. 409

Docket 47539

RULEMAKING PETITION OF ASSOCIATION OF
DISCOUNT TRAVEL BROKERS

on

FREQUENT FLYER PROGRAMS AND AWARDS

ORDER DISMISSING COMPLAINT AND DENYING PETITION FOR RULEMAKING

On May 8, 1989, the Association of Discount Travel Brokers ("the Association") filed a complaint against a

tariff of Continental Airlines, Inc. and Eastern Air Lines, Inc. that revised their One Pass frequent flyer program's rules and awards.¹ On May 16, on behalf of itself, Eastern, and One Pass, Continental filed a motion for leave to file out of time, which we will grant, and an answer in opposition to the Association's complaint.

Subsequently, on May 13, 1991, the Association filed a petition for rulemaking on the use and transfer of frequent flyer program awards. Trans World Airlines, Inc. ("TWA") in conjunction with Northwest Airlines, Inc. ("Northwest"), American Airlines, Inc. ("American"), Delta Air Lines, Inc. ("Delta"), and Continental Airline, Inc. ("Continental") filed responses to the petition for rulemaking. The Association then filed a reply to the responses.

For the reasons stated below, we will dismiss the complaint and deny the petition for rulemaking.

I. Tariff Complaint

A. The Complaint

The Association challenges the following revisions to the Continental-Eastern One Pass Tariff:

- (a) the revision reserving the right to modify, suspend, restrict, or otherwise alter all or part of the One Pass program upon 60 days' notice to active members;

¹ Under sections 221.250 and 302.505(b) of the Department's regulations (14 CFR 221.250 and 302.505(b)), a complaint requesting suspension of a tariff must be filed within ten days after the tariff's issuance date. The Association states that the geographically diverse situation of its members prevented it from meeting this deadline. We will treat this statement as a request for leave to file an otherwise unauthorized document (see 14 CFR 302.4(f)), which we will grant.

Since the filing of the complaint, Eastern Air Lines, Inc., has undergone liquidation under Chapter 7 of the bankruptcy laws.

- (b) the revision making fraud or abuse concerning One Pass mileage credit or reward usage subject to penalties, including termination of participation in the program and forfeiture of all accrued mileage, reward certificates, and tickets issued against reward certificates;
- (c) the revisions banning the sale, barter, or purchase of One Pass rewards, defining the sale, barter, and transfer of rewards or certificates other than as expressly permitted as fraud or abuse, making any rewards obtained by fraud or abuse void if transferred for cash or other consideration, and declaring that persons other than the individuals named on certificates who attempt to use them will be denied transportation and the certificates deemed void; and
- (d) the revision providing for capacity controls that limit the availability of seats offered for reward travel on certain flights and during certain times of the year.

The Association challenges the tariff as procedurally deficient, restrictive to price competition in air transportation, and unfair and unreasonable to consumers. First, it claims that these four provisions make material changes to the existing tariff "that severely restrict the benefits and rights of the frequent flyer." Contending that section 221.165 of the Department's rules (14 CFR § 221.165) requires an explanation for such substantive changes to consumer benefits, the Association argues that Continental's and Eastern's failure to supply such information violates our rule.

Second, the Association claims that its members conduct a legitimate business as discount brokers, and it charges Continental and Eastern (as well as other air carriers with frequent flyer programs) with improperly attempting to destroy this business. It is to this end, according

to the Association, that the airlines "started to include restrictions against transferability in the tariff, together with capacity controls, blackout dates[,] and the unilateral right for the airline to do as it desired to any part of its program."²

Third, the Association charges the Department of Transportation with failing to protect consumers by not adequately reviewing frequent flyer rules filed as tariffs. The Association also accuses the Department of granting Special Tariff Permission to frequent flyer tariffs without a showing of emergency or merit in violation of section 221.190 of our own rules (14 CFR § 221.190). It argues that once these tariffs have been approved, if carriers successfully argue in lawsuits that they have the force of law, consumers have no recourse.

Fourth, in addition to these general complaints, the Association states specific grievances against each of the four revisions listed above. The Association challenges revision (a) on the grounds that guidelines adopted by the National Association of Attorneys Generals ("NAAG") for frequent flyer programs would require notice of at least one year before an airline could terminate its program. The Association challenges revision (b) by claiming that the Department has never considered the reasonableness of such restrictive provisions and should do so "before allowing the consumer to be unreasonably penalized." It challenges revision (c) as a direct and illicit means of driving discount coupon brokers out of business. It challenges revision (d) as a tool that allows the airlines unfairly to "lure the consumer to fly . . . on the promise that the rider will earn a free trip to an exotic destination" and then either increase the mileage premium for that trip or drastically limit its availability.³

² Complaint of Association at 9.

³ Here, as in the case of revision (a), the Association cites the NAAG guidelines, which would require carriers to provide awards

Based on its allegations, the Association asks the Department to investigate the One Pass revisions and suspend the tariff.

B. The Answer

On behalf of itself, Eastern, and One Pass, Continental opposes the Association's complaint. In response to the contention that the Department has not adequately reviewed frequent flyer tariffs, Continental states that in 1988, the Department concluded after an informal investigation that One Pass's rules and tariff on capacity controls were proper and that there was no evidence of unfair or deceptive practices within the meaning of section 411 of the Federal Aviation Act.⁴

In response to the other allegations, Continental argues that the Association has misconstrued and misrepresented the nature of the relationship between frequent flyer programs and their members. Continental contends that the bulk of One Pass earnings and travel concern domestic air transportation, in which the relationship between air carriers and passengers has been governed since 1983 solely by contract law.⁵ Continental characterizes the revisions challenged by the Association as legitimate terms of the carriers' unilateral offer and part of their legitimate contract with One Pass members.⁶

either without capacity controls or, if capacity controls apply, within 15 days before or after the date originally requested. If all seats within this 31-day period were sold at the time the request was submitted, then the guidelines would require the airline to provide a seat on a date as close as possible to the date requested.

⁴ Response of Continental at 2-3.

⁵ Continental claims that One Pass gives its members copies of the program's rules when they apply for membership and keeps them apprised of all changes.

⁶ Continental argues, with many case citations, that a common carrier may prohibit its customers from selling their rights to travel at reduced fares and that in particular, an air carrier may prohibit the sale of its frequent flyer awards.

Continental denies that the challenged revisions are novel and asserts instead that they predate the tariff filing and have the force of contract apart from their inclusion in the tariff.⁷ Specifically, Continental asserts, these provisions have formed part of the One Pass program since its inception, and the program's applicants and members have always been notified of all applicable terms and conditions, including these provisions.

As for capacity controls, Continental denies that it or Eastern engages in misleading advertising, fails to provide award transportation at the mileage advertised, or fails to provide adequate capacity for award travel. Continental asserts that it and Eastern scrupulously adhere to the capacity provisions in the One Pass terms and conditions, and it repeats its assertion that these provisions have always been part of the program.⁸

II. Rulemaking Petition

A. The Petition

The proposed rulemaking has four principal elements: (1) elimination of sales and transfer restrictions on awards, (2) elimination of excessively restrictive capacity controls, (3) elimination of unreasonable blackout dates, and (4) notice of program changes.⁹ The Association claims that the proposed rule is designed to establish a uniform, nationwide frame of reference for resolution of the areas of major controversy surrounding the award, transfer, sale, or use of frequent flyer mileage

⁷ According to Continental, substantially all of One Pass terms and conditions now appear in the tariff.

⁸ Continental asserts that the original One Pass terms and conditions stated as follows:

Reward usage is subject to capacity controls which limits [*sic*] the availability of seats offered for for reward travel on certain flights and during certain times of the year.

⁹ Association Petition for Rulemaking at 7-8.

awards. The Association's arguments in support of its claims are substantially similar to those in its complaint and include the promotion of competition among air carriers, the protection of consumer interests from allegedly deceptive and unfair practices [under § 411 of the Federal Aviation Act], such as capacity controls, blackout dates, award structure/mileage requirements, and transferability restrictions, and the prevention of the airlines' improper attempt to destroy a legitimate business.

The Association analogizes the frequent flyer program with the "S&H Green Stamps frequent buyer program" at issue in *In re Sperry & Hutchinson Co.*, 73 F.T.C. 1099 (1968). The Federal Trade Commission in that case initially found similar acts, such as the transferability restrictions, to have violated the FTC Act, a statute the Association argues is substantially the same as § 411 of the Act.

B. The Responses

The respondents generally oppose the proposed regulations on the basis that (1) they deal with issues already resolved in court or pending in litigation, (2) they are impracticable, (3) discount brokers conduct illegal activity by defrauding the airlines, and (4) frequent flyer program rules are not unfair or discriminatory.

The respondents contend that the proposed regulations address issues that have already been resolved in the courts or are subject to pending litigation. American, in particular, notes that recent court decisions are based on longstanding precedent and principles confirming that "(1) a prohibition against purchasing and selling frequent flyer awards is a valid and enforceable contractual restriction on assignment; and (2) there are no complex unresolved issues—and never were—regarding the illegality of the brokers' conduct."¹⁰ American further notes

¹⁰ Response of American at 7.

that virtually every argument that the Association advances in its petition failed to gain acceptance in frequent flyer litigation, including the premises that frequent flyer members have vested property rights to travel awards and that airline program rules are unfair trading practices and violate the Sherman Act. American and Delta specifically note that, under the final FTC consent order, S&H was expressly *permitted* to continue to restrict the transferability and exchange of its stamps. *Sperry & Hutchinson Co.*, 83 F.T.C. 478 (1973).

According to American and the other respondents, the Association is in effect asking the Department to legitimize the allegedly illegal activities of the discount brokers, who engage in systematic fraud and deception in order to conduct their business. According to the TWA/Northwest response, these activities may constitute criminal activity pursuant to 18 U.S.C. § 1343 and 18 U.S.C. § 1341. American alleges that some brokers' contracts with their customers use indemnification language that makes the customers liable for the brokers' unlawful conduct.¹¹ In fact, American claims that the brokers often use the same contract transferability restriction with their own customers that they claim is unfair and discriminatory on the part of airlines.¹² Delta contends that the brokering operations violate the Lanham Act and commercial disparagement, false advertising, and unlawful racketeering activities in violation of the Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq.

Furthermore, the respondents contend that it would be impracticable for the Department to involve itself in what are essentially business decisions regarding ongoing advertising and promotional programs. Frequent flyer programs extend beyond the airlines to telephone companies,

¹¹ *Id.* at 12.

¹² *Id.*, at 11, footnote 11.

car rental companies, hotels, and credit card companies through which ancillary mileage credits can be accumulated. Consequently, awards also extend beyond free or reduced rate transportation to free or reduced rate rental cars, hotel accommodations, rail transportation, and other benefits. The respondents also argue that, if the Department adopts the proposed rule, these ancillary industries, although affected, would be beyond the jurisdiction of the Department."¹³

The respondents also contend that market forces are in a better position than the Department to correct any perceived abuses in the frequent flyer program. Presumably the first airline to adopt the "fairer" rules would gain an immediate increase in business if the present rules are as restrictive and unfair as the petitioner suggests.

The respondents take exception to the petitioner's allegations of deceptive and unfair practices. The TWA and American programs were not as wide open at their inception as the petitioner suggested. For example, mileage could only be accumulated on domestic flights, and the program was originally offered as a limited-time promotional campaign. Benefits have expanded dramatically because of market forces. With time, the program rules were liberalized by, among other things, adding other carriers as travel partners and allowing consumers to accumulate mileage on international flights. Moreover, the respondents claim that they need a certain amount of flexibility in meeting consumer needs.

The respondents claim that past changes to program award structures have not been as injurious as alleged by the petitioner. TWA specifically notes that its increase in the mileage award levels only affected certain routes. Most of the award levels remain the same as in 1981,

¹³ Responses of American and TWA at 16-17 and 4, respectively.

when TWA offered only six awards in comparison to the present 60 awards. In 1990, TWA established an Equity Miles program which allows all members with previously accumulated mileage to claim awards under either the old or new award structure. American offers flight upgrades to its member who fly so much that they arguably do not want a free trip. Delta also claims that in many cases awards are now available for lower mileage than in the early 1980s.

The respondents assert that members have had sufficient notice of the programs' governing rules. For at least eight years the contract terms of the TWA program have included a prohibition against barter, trade, or sale of the award certificates, notification of some capacity control, and notification that program rules were subject to change at any time. Similarly, American has had the same no-sale rule printed on its travel awards since 1983. In addition, Delta's initial rules provided that the awards were "non-transferable". In 1983 and 1985, Delta clarified these rules.

American specifically criticizes the other proposed provision regarding capacity controls and notice of program changes. For example, American characterizes the proposed provision regarding capacity controls as both "meaningless and impossible" because it would prohibit capacity controls of any type unless all seats on a flight were already reserved, including by an unlimited number of passengers using frequent flyer awards.¹⁴ Moreover, American asserts that the Association's proposed prohibition of all capacity controls for two full years would make it impossible for carriers to take any measures to limit revenue displacement during that period. Similarly, Continental notes that if carriers were to be forced by regulation to make available free seats without time or route or capacity limitations, and deny themselves needed reve-

¹⁴ Response of American at 18.

nue, they could be forced to eliminate frequent flyer programs altogether.¹⁵

C. Reply

The Association takes exception to the respondents' arguments on five grounds. First, the Association contends that the requested rulemaking is an appropriate exercise of the Department's enforcement jurisdiction under Section 411. Second, it claims that local civil court actions do not justify the summary rejection of the petition. Third, the Association claims that the petition cannot be summarily rejected on competition, cost, or industry impact grounds. It states that it does not propose any mandatory inter-carrier transfer of frequent flyer program mileage or awards, and the proposed rule is not inconsistent with reasonable carrier efforts to promote brand loyalty. The Association claims that no carrier has disputed its claim that the proposed rule can be implemented without appreciable economic harm to the industry, and it views the suggestions that the frequent flyer programs might be discontinued as unsubstantiated threats. Fourth, the Association claims that the petition cannot be summarily rejected as demonstrably unworkable. Finally, it argues that efforts to squelch secondary markets are not presumptively lawful, but rather highly suspect. It takes issue with the carriers' responses concerning the antitrust considerations of *Sperry & Hutchinson*.

III. Disposition

The One Pass revisions do not violate the Federal Aviation Act or any pertinent rules or policies of this Department. In addition, adoption of the proposed regulations is not warranted. We therefore dismiss the Association's complaint and deny the petition for rulemaking.

We have already addressed some of the issues raised in the complaint in Order 89-9-25, in which we dismissed the Association's complaint against revisions by American

¹⁵ Response of Continental at 3.

Airlines to its frequent flyer program. We held in that order that rules governing frequent flyer programs—as distinguished from the schedule of bonus award levels—are not required to be filed as tariffs. We also held that even if carriers do file them as clarifying information, such filing does not give these rules the legal effect of a federally approved tariff. The Association has made no effort to show why our conclusions in Order 89-9-25 are not applicable here.¹⁶ Continental correctly describes the relationship between frequent flyer programs and their members as a contract in which the carrier offers to provide benefits subject to the program's terms and conditions and the participant accepts the offer by joining the program and flying on the carrier.¹⁷

Because program rules are not required to be filed and do not have the legal effect of a Federally-approved tariff, the Association's procedural challenges regarding the sufficiency of Continental's and Eastern's explanation of their revisions, a showing of emergency or merit, and the sufficiency of the Department's review must be rejected.

As for the adoption of rules regulating certain aspects of the airlines' frequent flyer programs, the Association's rulemaking petition rests on its assumption that the carriers' restrictions on the transfer or sale of frequent flyer awards, their current capacity control and blackout date practices, and their allegedly inadequate notice to consumers constitute unfair and deceptive practices and un-

¹⁶ For an explanation of this policy, see Order 89-9-25, at 4-5.

¹⁷ Continental does err, however, in stating that in domestic air transportation, the relationship between carriers and passengers is governed solely by contract law. Section 411 of the Act, with its prohibition of unfair and deceptive practices and unfair methods of competition, still applies to domestic air transportation as well as to international air transportation, as do various regulations issued under its authority: *see, e.g.*, 14 CFR Parts 373 (concerning consumer credit), 250 (concerning denied boarding compensation), and 399.88 (concerning code sharing).

fair methods of competition in violation of section 411.¹⁸ The Association has failed to show, however, that the practices it challenges may violate section 411. We are therefore denying the Association's rulemaking petition.

The Association argues in part that its proposed rules are required because the carriers have engaged in deceptive practices, since program members have allegedly received too little evidence notice of changes in the programs and of such restrictions as the prohibition against giving frequent flyer awards. The Association therefore asks that we adopt rules requiring carriers to give "reasonable" advance notice of capacity controls, 180 days' notice of blackout dates, and one year's notice of program changes that make it harder for members to earn or use awards.

We find that the Association has not shown that the carriers' conduct misleads or is likely to mislead program members. It has provided statements by some program members that they were unhappy with certain program changes or surprised to learn that awards could not be used on some routes at some times. Petition at 77, 82. It further alleges that most program members think they have the right to sell their awards. Petition at 38, 39. This evidence is insufficient to demonstrate actual or potential deception, and no program materials have been produced that substantiate the allegation. The Association has not shown that members are unaware that carriers reserve the right to change the terms of the programs or impose blackout dates and capacity limits. More importantly, the Association has not attempted to show that the actual notice given by any carrier is in fact inadequate. The carriers, on the other hand, state that they have given members notice of the transfer restrictions and

¹⁸ The Association does not seek a prohibition of frequent flyer programs or even a prohibition of all use of capacity controls and blackout dates. Petition at 2, 60, 80, 84.

program changes. The carriers also assert that they have repeatedly informed members that the program terms could be changed at any time. *See, e.g.*, Delta Response at 4-5; TWA/NW Response at 8. Given this evidence, we see no need for a general rulemaking of the type requested by the Association.

The Association further argues that a rulemaking is necessary because the challenged carrier practices are unfair methods of competition. However, the Association has not demonstrated that the carriers' frequent flyer program practices violate the antitrust laws or are analogous to antitrust law violations. In fact, the Association states that it does not claim that frequent flyer programs violate the Sherman or Clayton Acts. Petition at 60. It has also not tried to show that the program practices at issue are analogous to antitrust law violations. Consequently, the Association has failed to show that the program practices at issue are unfair methods of competition. *Cf. Continental Air Lines v. American Airlines*, Order 85-12-69 at 6 (December 24, 1985); *Air Florida v. Eastern Air Lines*, Order 81-1-101 (January 21, 1981). Furthermore, one court has held that TWA's program restrictions did not violate sections 1 or 2 of the Sherman Act. *Trans World Airlines v. American Coupon Exchange*, 682 F. Supp. 1476, 1485-1488 (C.D. Calif. 1988), *rev'd in part on other grounds*, 913 F.2d 676 (9th Cir. 1990).

While the Association nonetheless claims that the program terms at issue (*e.g.*, transfer restrictions) unreasonably limit competition, it has not explained in any detail how those practices could have such an impact. The Association asserts, for example, that the carriers' current operation of the programs keeps new firms from entering the airline industry. Petition at 4, but it never explains why its proposed rules would encourage entry or why the carriers' prohibition against selling awards discourages entry.

The carrier restrictions on the sale of awards may put the Association's members out of business by making the purchase and sale of frequent flyer awards difficult or impossible. Petition at 61-62. Nevertheless, in other industries the courts have held that a producer of a product may terminate the distribution of its product through independent wholesalers and instead distribute the product itself to consumers, at least if it has not engaged in predatory conduct and has a legitimate reason for the change in distribution. *See, e.g., Paschall v. Kansas City Star Co.*, 727 F.2d 692 (8th Cir. 1984) (*en banc*), *cert. denied*, 469 U.S. 872; *Naify v. McClatchy Newspapers*, 399 F.2d 335 (9th Cir. 1979). In these circumstances, a carrier's exercise of this right with respect to program awards does not violate the antitrust laws or their spirit.

Furthermore, as is apparent from the Association's own pleadings, the carriers use their programs as a means of competing for passengers. *See, e.g.*, Petition at 19, citing Delta's triple mileage promotion. *See also Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems*, prepared by the Secretary's Task Force on Competition in the Domestic Airline Industry, at 39. Since the programs began, each carrier has greatly expanded the kinds of awards that members can obtain and the ways in which members can accumulate award miles in order to make its program more attractive. *See, e.g.*, TWA/NW Response at 5-8; American Response at 3. These facts contradict the Association's contention that the carriers operate the programs so as to reduce competition.

We also find that the program terms at issue are not unfair practices, within the meaning of section 411. In administering section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, the model for section 411, the FTC has stated that a firm's conduct may be an unfair practice if it violates public policy, is immoral, or causes substantial consumer injury not offset by any countervailing

benefits. Petition at 56-57. See also *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244, n. 5 (1972). The Association has not shown that the specific practices challenged by it should be proscribed on these grounds.¹⁹ The Association does not claim that the program terms at issue are immoral. They also do not appear to be contrary to any established public policy. In an analogous situation, the courts have found that carrier restrictions on the transfer of tickets do not violate public policy principles. *Bitterman v. Louisville & Nashville R.R.*, 207 U.S. 205, 221-222 (1907); *Trans World Airlines v. American Coupon Exchange*, 913 F.2d 676, 686-689 (9th Cir. 1990).²⁰

The challenged program features, moreover, do not appear to cause unwarranted consumer injury. Instead, they seem to be legitimate methods for controlling the cost of frequent flyer plans. Without such restrictions, carriers might choose to terminate or cut back the programs. As American puts it, "Like all marketing programs, what makes frequent flyer programs possible is precisely the mutually beneficial balance which enables airlines to offer such extraordinary and valuable benefits to their members without suffering substantial revenue loss." American Response at 17. Even the Association admits that capacity controls and blackout dates serve a legitimate

¹⁹ The carriers, on the other hand, argue that we should deny the Association's petition because its members' purchase and sale of awards violates several statutes and involves the use of fraud. We need not address these contentions, for the Association has not justified conducting its proposed rulemaking under section 411.

²⁰ The Association complains that the restrictions on using and selling awards keep corporations from using awards for business purposes, even though many program members accumulate award miles on trips paid for by their employers. Petition at 32-37. No corporation has supported the Association's petition, however, and some corporations have developed methods of recapturing awards. Petition at 35-36. Corporations can also develop means of ensuring that employees purchase the cheapest available fare rather than buy a ticket enabling them to earn award miles. *Airline Marketing Practices*, *supra*, at 18, 19-20.

purpose by reducing the number of paying passengers displaced by users of program awards. Petition at 80, 84. Restrictions on the transfer of awards similarly limit carrier costs and revenue losses.

The Association's petition assumes in large part that we should prohibit practices considered unfair by some consumers or businesses, even if they involve no deception or threat to airline competition. This is an incorrect reading of section 411, for that section does not give us unlimited authority to regulate airline practices. To adopt the more expansive interpretation of section 411 proposed by the Association, would frustrate Congress' decision that the public will benefit if airline fares and services are determined by market forces rather than government regulation. See *Order 89-9-25* (September 13, 1989) at 4-5. Furthermore, even apart from Congress' decision to deregulate the airline industry, the courts have held that section 5 does not give the FTC unlimited authority to proscribe competitive practices that it considers unfair or undesirable. See, e.g., *E.I. DuPont Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917.

Although it has failed to show that the carrier practices violate section 411 under our precedent, the Association argued that a Federal Trade Commission proceeding involving S&H green stamps supports its contention that the carriers' practices should be deemed unfair methods of competition under section 411. Association Reply at 27-32. We disagree. In that proceeding, begun in the late 1960's, the FTC initially held that Sperry & Hutchinson, the seller of S&H green stamps, could not block trading stamp exchanges from buying, selling, and trading green stamps with consumers. After the courts vacated this FTC order, the agency settled the case in a way which did not block Sperry & Hutchinson from seeking to enjoin the future operation of such stamp exchanges. That resolution of the case is, of course, contrary to the Association's position here.

Finally, the Association argues that the airline industry and program members would benefit if we established uniform rules for the programs, since various state and federal courts may in effect regulate the programs through their adjudication of individual contract suits. This process assertedly may result in each state having its own rules or in the lack of any regulation of the programs, given the carriers' arguments that the states are preempted by section 105 of the Act, 49 U.S.C. 1305, from regulating the terms of frequent flyer programs.

This argument provides no basis for adopting the rules sought by the Association. First, even if uniform regulation were desirable, we could adopt such rules only if the carriers' conduct violated section 411.²¹ As shown, the Association has failed to show that such violations may have occurred. Secondly, this argument assumes that some agency should be closely regulating the terms and conditions of frequent flyer programs. We disagree in light of Congress' decision to deregulate the airline industry.

In addition, we doubt that our lack of regulations will lead to significant confusion. Even though some courts have held that general state contract laws may apply to airline-consumer relationships, such state contract laws of general applicability cannot authorize a determination of whether individual terms and conditions of a carrier's program are fair and reasonable, to the extent they relate to an airlines' rates, routes and services. Such state regulation is preempted under section 105 of the Act.

ACCORDINGLY, I dismiss the tariff complaint and deny the petition for rulemaking in these dockets.

By:

JEFFREY N. SHANE
Assistant Secretary for Policy
and International Affairs

(SEAL)

²¹ See *United Air Lines v. CAB*, 766 F.2d 1107 (7th Cir. 1985).